EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr F Hassan	**v**	(1) TripActions Limited (2) Mr C Delatorre

Heard at: Central London Employment Tribunal (via CVP) On: 21-29 September 2022
And in chambers on 30 September
and 4-5 October 2022

Before: Employment Judge Norris Members: Ms G Carpenter, Ms L Woodward

Representation:
Claimant: Mr J Sykes, Litigation Advocate
Respondent: Ms K Balmer, Counsel

RESERVED JUDGMENT

The Tribunal's unanimous decision is that the Claimant's claims of race discrimination, race-related harassment and detriment/dismissal for making protected disclosures are not well-founded and are dismissed.

REASONS

Background

1. The Claimant worked from October 2020 until July 2021 as Vice-President, Commercial and Mid-Market Sales for the First Respondent, at its EMEA office in London. The First Respondent is a supplier of corporate travel and spend management services. At the material time, the Second Respondent was the Chief Revenue Officer (CRO) of both the First Respondent and its US-based parent company.

2. The Claimant's employment ended when the Second Respondent dismissed him at a meeting on 1 July 2021. The Respondents say that the reason for dismissal was the Claimant's misconduct, specifically in relation to breaches of the internal Rules of Engagement for the First Respondent's sales teams and for a lack of integrity. The Claimant says that his dismissal was because of race and/or because he had made protected disclosures.

3. The Claimant entered ACAS Early Conciliation (EC) for a single day (1 October

2021) against both Respondents and lodged a claim with the Central London Employment Tribunal on the same day, complaining of unfair dismissal. The Respondents defended the claim.

Case progress and conduct of the Hearing

4. A Preliminary Hearing (Case Management) (PHCM) took place before EJ Glennie on 20 January 2022. He listed it for a Preliminary Hearing, which took place before EJ Jeremy Burns on 10 March 2022. EJ Burns refused the Respondents' application to strike out the claim and/or to make a deposit order (or more than one). He ordered a list of issues to be agreed and confirmed the listing of seven days between 21 and 29 September – to include both liability and remedy if appropriate - that had been previously made by EJ Glennie. EJ Burns also made case management orders to the effect that (so far as is relevant to this decision):

    a. The final trial bundle, limited to 500 pages, was to be agreed by 1 July 2022 and a copy sent by the Respondents' solicitor to the Claimant;
    b. Witness statements (also limited, by word count) were to be exchanged by 29 July 2022;
    c. Mr Sykes, representative for the Claimant, had undertaken to be on time for the start of each day of the Hearing, which was to be in person.

5. These orders were later varied on the application of Mr Sykes to:

    a. The Hearing would be entirely by CVP;
    b. Witness statements were to be exchanged by 17 August 2022.

6. On the first morning of the Hearing, each side's representative produced an opening note, and Ms Balmer had also prepared a document that she called a "roadmap" incorporating the issues in the case in a chronological order. The Tribunal had before it a Hearing bundle in two parts which ran to a total of 560 pages. This was supplemented by additional documents during the course of the Hearing, to which we return below. The Claimant also had outstanding applications as to:

    a. Specific disclosure; and
    b. In the appeal officer Ms Whitehead's statement, the striking out of references to the chronology of assertions being made by the Claimant following advice from Mr Sykes.

7. We had witness statements from the Claimant's side from the Claimant himself and the following former colleagues of the Claimant:

    a. Mr Patrick Williams;
    b. Ms Hayley Doutrich;
    c. Mr James Funge.

    For the Respondents we had witness statements from:

    d. Ms Kirsten Michelle ("KiMi") Zuluaga, Senior Manager/Director, People Success;
    e. Mr Carlos Delatorre, Second Respondent;

f. Mr Vadim Zakiyan, VP Sales Operations;
g. Ms Rachel Whitehead, Director Legal Corporate Operations.

We understand that all of the witnesses save Mr Funge and the Claimant were employed by the US parent company.

8. The Hearing started at 10.00 on 21 September 2022 by CVP. The Claimant was sitting alongside Mr Sykes in the latter's office. At the outset of the Hearing, the Second Respondent attended from Italy but he came to the UK while giving evidence (we return to this below). All the other witnesses gave evidence by CVP either from the USA (with the permission of the relevant authorities) or from the UK.

9. The Claimant had applied for a witness order for an additional witness, Mr Colin Doyle, another former colleague employed by the First Respondent. At Mr Doyle's request, the order had been varied to require him to attend at a specific time, i.e. at 10.00 on Friday 23 September. Mr Sykes said he had sent Mr Doyle a draft witness statement but had not yet heard back from him. Mr Doyle did subsequently produce a signed witness statement dated 22 September 2022, which was added to the items before the Tribunal.

10. The Claimant's specific disclosure application could not be dealt with until the panel had read in so as to determine the relevance of that application in context. We took the first morning to read the papers, and while we were doing so, the Respondent sent to the Claimant and the Tribunal the documents that were the subject of the application. In the circumstances this application did not need to be addressed once we reconvened at 14.00 on day one.

11. As for the application to redact sentences from Ms Whitehead's witness statement, this was refused. Reasons for this and the other decisions made were given briefly at the time. In summary, Ms Whitehead did not (indeed, could not) give any evidence as to the **content** of the advice given by Mr Sykes to the Claimant during his disciplinary hearing, she could only refer to the **fact** that she perceived the Claimant was better able to articulate his assertions, in particular as to race discrimination, after he had consulted with Mr Sykes. The contentious sentences referred only to the timing of that advice and the impact that this had on Ms Whitehead's findings in the appeal.

12. In any event those sentences were not, and again, could not be, covered by legal professional privilege. Mr Sykes is not a solicitor and was accompanying the Claimant to the disciplinary hearing as his companion. They might have been covered by litigation privilege however, the question of which we consider below.

13. The Claimant's opening note also asserted that a number of documents in the second part of the bundle should not be before the Tribunal, or should only be before the Tribunal along with other items to contextualise them; in view of the time limitations however, we had little or no regard to pages in the bundle to which we were not taken.

14. The Claimant gave evidence on oath and following a very small number of additional questions in chief, was cross examined for the remainder of the first day and for the whole of day two.

15. On day three Mr Doyle was interposed. Mr Sykes had a number of questions in chief for him which took around the first 45 minutes and then he was cross examined for around 20 minutes before answering questions from the panel. The Claimant's cross examination then concluded and he in turn answered panel questions before we took a late lunch. The Claimant's re-examination took just over half an hour.

16. Mr Funge was then called by the Claimant starting at 14.53. Mr Funge had been in attendance during the morning but told the Tribunal that he had to go at 15.00 because he had an interview to attend, which would take around half an hour. There were no supplementary questions in chief and he was cross examined briefly until being released for his interview. Ms Doutrich, who is based in the USA, was also interposed and again there were no supplementary questions for her in chief. Her cross examination was concluded quickly and there were no panel questions so that with re-examination she was released just after 15.15 and we took a break before completing Mr Funge's evidence.

17. It had been envisaged that Mr Williams, who is also based in the USA, would also give evidence on the third afternoon (Friday 23 September). However, we were told that he had had an emergency and would not be free until the afternoon of Monday 26 September at 15.00.

18. So as not to lose time, and as Mr Williams was to be the last of the Claimant's witnesses, we proposed starting the Respondent's case. Mr Sykes said he had not prepared his cross examination. However, we began hearing Ms Zuluaga's evidence and she was asked supplementary questions in chief and her cross examination took up the last half hour on that afternoon.

19. Ms Zuluaga was asked by Mr Sykes about an investigation that had taken place in May 2021 which she said had been prompted by a list of deals over which concerns were raised. It was put to her that the list of deals did not exist, which she refuted. Mr Sykes said that this went to her credibility and accordingly Ms Zuluaga was ordered to produce it for the Monday afternoon when her cross examination would continue, 10.00 UK time being 02.00 in her time zone.

20. The first half hour of the Monday morning (day four) was taken up with matters of housekeeping/case management. The Claimant applied for two further items to be produced by the Respondent and to be put before the Tribunal: the unredacted email confirming his dismissal and a copy of the settlement agreement that had been offered to him by the Respondent which was attached to that email. After hearing argument from the representatives, we agreed that an unredacted copy of the email from the Respondent to the Claimant (and the one to Mr Bourner, one of the Claimant's direct reports who was dismissed at the same time as the Claimant) should be disclosed, and made an order to that effect.

21. We took a different approach to the settlement agreement. We were satisfied that this was covered by principles of privilege. It was a document produced "without prejudice" and there was no evidence of any unambiguous impropriety before us. Mr Sykes asserted that it showed the Respondent was threatening to withhold the Claimant's entitlements unless he entered a settlement agreement; but the Claimant accepted that he was paid in lieu for his final salary, expenses and

accrued but untaken holiday, in the payroll run after his dismissal.

22. We accept that the wording of the email in question was unfortunate and open to more than one interpretation ("The business has decided to terminate your contract with TripActions Limited for cause. Nevertheless we are paying you through your contractual notice period, and offering you an additional payment in exchange for a mutual termination and release of claims (settlement draft attached here). … Attached is the settlement agreement that needs to be signed by you and a solicitor to be able to proceed with the final payment…" (our emphasis)). It may have suggested to the Claimant on 2 July 2021 that the "final payment", including his strict entitlements, would only be paid if a settlement agreement was entered, but, regardless of how it was interpreted by the Claimant or indeed by Mr Sykes himself, it is clear in retrospect (and was clear by the end of that month when the Claimant's entitlements were paid) that he/they were in error in the way they had read it and that the Respondent was not in fact withholding those payments pending completion of a settlement agreement.

23. It is also clear that both parties anticipated as at the date the Respondent offered the Claimant a settlement agreement that if this was not signed, there might be litigation. We have noted above that if Mr Sykes' discussions with the Claimant at his internal appeal hearing were privileged at all, that must have been litigation privilege rather than legal professional privilege, although his email applying for sentences to be struck out of Ms Whitehead's statement asserted both.

24. We referred Mr Sykes to the case of *Evanson v Scheldebouw BV*[1], heard by this Employment Judge and which has recently been upheld in the EAT as to the point at which privilege arises, although the full decision of Cavanagh J has not yet been handed down. Mr Sykes indicated that he would read that decision (and, more particularly, the analysis of the law contained therein) and revert if he pursued the application. In the event, he did not pursue it, and so the settlement agreement was not before the Tribunal.

25. We then heard from the Second Respondent, who is based in Italy but had flown to the UK for the purposes of giving evidence since the Italian authorities had not responded to the request for him to do so from there. He was asked supplementary questions in chief for 20 minutes and then his cross examination began. This continued until lunchtime. We then had the cross-examination of Ms Zuluaga interposed before a short break and then the Second Respondent continued for the rest of that day and for the morning of day five.

26. Mr Williams was able to join and be heard entirely in the early afternoon of day five, before the Second Respondent's cross-examination resumed. That continued after a slightly delayed start on day six. He was re-examined briefly before cross-examination of Mr Zakiyan began. Mr Zakiyan was part-heard overnight.

21. On the morning of the last day and before cross-examination of Mr Zakiyan resumed, Ms Balmer began by saying that the First Respondent had located some documents that had relevance to a question that had been asked of Mr Williams by one of the panel. She had not yet sent these items to Mr Sykes, anticipating

[1] 2202998/2019/EA-2021-000290- JOJ

that he would be resistant to their inclusion. Mr Sykes indeed began objecting loudly even to receiving them from Ms Bourner and said that he would have to recall Mr Williams. There was no reason objectively for him to do so and in fact the Respondents were not applying to admit the documents in evidence at that stage, merely alerting the Claimant and the Tribunal to their existence. Having warned him first of her intention to do so, the Employment Judge muted Mr Sykes's microphone when he began to shout at her, whereupon Mr Sykes left the virtual room, disconnecting both himself and the Claimant. The Hearing was adjourned to make enquiries as to whether he and the Claimant intended to return.

22. When the Hearing reconvened, Mr Sykes indicated that he intended to make an application for the Employment Judge (but not the two non-legal Members) to recuse herself. He indicated that if the application was refused, he would immediately go to the EAT. He asked for time to prepare a recusal application, which was granted. He sent in by email a written application, to which he then spoke orally and Ms Balmer responded. Following a further adjournment, it was decided that the Employment Judge would not recuse herself and the Hearing continued with the conclusion of Mr Zakiyan's evidence being heard before and after, and the evidence of Ms Whitehead entirely after, the lunch break.

23. The Hearing concluded at 17.38 on 29 September, having heard oral submissions from the parties. Written submissions were invited, including - if considered necessary - a "right of reply" on the law as advanced by the parties in their oral submissions. Written submissions were received by the deadline of 10.00 on 30 September and the panel reconvened in Chambers on that day and on 4 and 5 October 2022 to consider its findings.

Behaviour of Mr Sykes

24. We feel compelled to make a general observation about Mr Sykes' conduct during the proceedings, while at the same time making it clear that that conduct did not prejudice our considerations against the Claimant or his case. The Hearing occasionally became heated, with both representatives putting to the other side's witnesses in cross-examination that they were lying, but Mr Sykes went further. He repeatedly also made allegations of lying/being a liar against his professional opponents: he threatened to report Ms Balmer and her instructing solicitors to their professional bodies for lying and alleged that they and at least one witness (Ms Zuluaga) had engaged in falsifying evidence. He showed no basis for so asserting.

25. We have noted above that Mr Sykes put to Ms Zuluaga that the deal list to which she referred in answer to a cross examination question from him did not exist, and when she was ordered to (and did) produce it for the next session, he (again baselessly) alleged that it had been drawn up fraudulently in an attempt to mislead the Tribunal. We return to this specific example below in considering the evidence, but we note that this was something which Mr Sykes did on more than one occasion: when questions were asked of witnesses in cross-examination or by the panel and the Respondent(s) then applied to submit evidence arising from and in support of answers given, Mr Sykes objected to the admission of that evidence, while simultaneously asserting that what the witness had said was untrue or falsified.

26. Mr Sykes also repeatedly interrupted and spoke over Ms Balmer (including when

she was merely giving a reference to a page in the bundle to assist a witness in finding a document) who indicated that she had felt "bullied" by this behaviour, and over the Employment Judge, raising his voice to an unacceptable level that we describe as shouting. On two occasions when he was shouting at the Tribunal, we needed to mute his microphone. We have referred above to one of those occasions (the morning of the last day of evidence); the other had been the previous afternoon. Mr Sykes apologised for shouting at the Tribunal on the last morning; he said he had been intending to shout at Ms Balmer but in his "fury" had not altered his register. He added however that he had meant no disrespect to Ms Balmer in expressing the Claimant's "extreme dissatisfaction" in relation to what were perceived as biased rulings against him. We consider that this apology speaks for itself.

The law

Burden & standard of proof – discrimination

27. The provisions of section 136 Equality Act 2010 ("EqA/Act") apply to complaints of discrimination. They state that if there are facts from which the court could decide, in the absence of any other explanation that a person contravened the provision concerned, the court must hold that the contravention occurred, save where the person can show that they did not contravene the provision. This is commonly referred to as the shifting, or reversing, burden of proof: the Claimant has to show facts from which we could decide that the Respondent(s) breached the Act, and if he does so, the burden moves to the Respondents to show that they did not do so.

28. Authorities, some pre-dating the coming into force of the Act (e.g. *Igen v Wong*[2], *Laing v Manchester City Council*[3], *Villalba v Merril Lynch*[4], *Madarassy v Nomura International PLC*[5]) and others that post-date it (e.g. *Hewage v Grampian Health Board*[6]) deal with the reversal of the burden of proof.

29. In *Igen v Wong*, the Court of Appeal (Gibson LJ) set out the revised *Barton*[7] guidance as follows (updated legislative references are in square brackets as appropriate):

"(1) *Pursuant to section [136 Equality Act 2010], it is for the claimant who complains of […] discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part[s 5 or 8…]. These are referred to below as "such facts".*

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of […] discrimination. Few employers would be prepared to admit such discrimination, even to

[2] [2005] IRLR 258 CA
[3] [2006] IRLR 748 EAT
[4] [2006] IRLR 437 EAT
[5] [2007] 246 CA
[6] [2012] IRLR 870 SC
[7] *Barton v Investec Securities Ltd* [2003] ICR 1205

themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s.[136(2)]. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) […]

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts […]. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably [because of a protected characteristic], then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of [the protected characteristic], since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that [the protected characteristic] was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

30. In *Madarassy,* the Court of Appeal observed that "*Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts*".

However, it went on to confirm that the burden of proof does not shift to the Respondent simply because the Claimant has established "*the facts of a difference in status and a difference in treatment*"; that indicates only the "*possibility of discrimination*". They are not, "*without more*", sufficient. Further, as the EAT had pointed out in *Laing*, the treatment (or indeed mistreatment) of other employees by the Respondent may be examined at the "*first stage*" of the process as well as at the second.

31. In *Hewage*, Hope LJ observed that tribunals can exaggerate the importance of the *Igen v Wong* provisions and that if the Employment Tribunal is in a position to make positive findings, the provisions may even have "*nothing to offer*". However, *Hewage* also confirmed that, absent any other explanation, if a Claimant shows facts that are capable of supporting an inference of unlawful discrimination, it falls to the Respondent to disprove it.

32. In each complaint, the standard of proof applicable is the balance of probabilities.

33. In *Igen v Wong*, the Court emphasised that the statutory language needs to be observed. While we may summarise some relevant provisions in this decision, we had regard to the precise wording of the statutes in the decision-making process.

Direct discrimination

34. By virtue of section 13 EqA, direct discrimination occurs when an employer treats an employee less favourably than they treat or would treat others because of a protected characteristic (in this case, race).

35. Complaints of direct discrimination require a comparator who does not share the protected characteristic but who otherwise is in not materially different circumstances. Such comparator may be actual or hypothetical.

Harassment

36. Section 26 EqA 2010 provides:

> *"(1) A person (A) harasses another (B) if –*
>
> *(a) A engages in unwanted conduct related to a relevant characteristic, and*
> *(b) the conduct has the purpose or effect of –*
> *(i) violating B's dignity, or –*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …*
>
> *(4) In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account –*
>
> *(a) the perception of B;*
> *(b) the other circumstances of the case;*
> *(c) whether it is reasonable for the conduct to have that effect*."

37. The meaning of '*related to*' is distinct from and broader than the '*because of*' formulation under s.13 EqA. It is not, however, to be reduced to a "but for" test and it is not enough to point to the relevant characteristic as the mere background to the events.

38. As Underhill LJ said in *UNITE the Union v Nailard*[8]:

> "… *The necessary relationship between the conduct complained of and the claimant's gender was not created simply by the fact that the complaints with which they failed to deal were complaints about sexual harassment — or, in the case of Mr Kavanagh, that part of the situation that led him to decide to transfer the claimant was caused by such harassment*."

39. In considering whether a remark that is said to amount to harassment is conduct related to the protected characteristic, the Tribunal has to ask itself whether, objectively, the remark relates to the protected characteristic. The knowledge or perception by the person said to have made the remark of the alleged victim's protected characteristic is relevant to the question of whether the conduct relates to the protected characteristic but is not in any way conclusive. The Tribunal should look at the evidence in the round (per HHJ Richardson in *Hartley v Foreign and Commonwealth Office Services*[9]).

40. In considering whether the conduct is related to the protected characteristic, the Tribunal must focus on the conduct of the individuals concerned and ask whether their conduct is related to the protected characteristic (*Nailard*).

41. In *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*[10], HHJ Auerbach gave further guidance:

> "21. *Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself. The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.*
>
> *24. However, as the passages in Nailard that we have cited make clear, the broad nature of the 'related to' concept means that a finding about what is called the motivation of the individual concerned is not the necessary or only possible route to the conclusion that an individual's conduct was related to the characteristic in question. Ms Millns confirmed in the course of oral argument that that proposition of law was not in dispute.*
>
> *25. Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the*

[8] [2019] ICR 28
[9] UKEAT/0033/15/LA at [24-2])
[10] [2020] IRLR 495

Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be."

42. In *Weeks v Newham College of Further Education*[11], Langstaff J said at [21]:

"*An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned. We cannot say that the frequency of use of such words is irrelevant*."

43. In *Richmond Pharmacology v Dhaliwal*[12], Underhill J (as he was) said:

"15…A Respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard…. Whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.

22…We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…".

<u>Protected disclosures/"whistleblowing"</u>

44. The Employment Rights Act 1996 ("ERA") contains the following relevant provisions:

"*43B. Disclosures qualifying for protection.*

[11] UKEAT/0630/11/ZT
[12] [2009] IRLR 336

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

…

47B. Protected disclosures

…

(2) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

…

48. Complaints to employment tribunals

(1)(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

103A. Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

45. The burden of proving each of the elements of a protected disclosure is on a Claimant (*Western Union Payment Services UK Ltd v Anastasiou*[13]).

46. In *Kilraine v London Borough of Wandsworth*[14] the Court of Appeal held that a sharp distinction between "allegations" and "disclosures" which appeared to have

[13] , 13 February 2014 per HHJ Eady QC at [44]
[14] [2018] ICR 1850

been identified in earlier authorities was a false dichotomy, given that an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

> *"In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."*

47. There is an initial burden of proof on the Claimant to show (in effect) a prima facie case that he has been subject to a detriment on the grounds that he made a protected disclosure. If so, the burden passes to the Respondent to prove that any alleged protected disclosure played no part whatever in the claimant's alleged treatment, but rather what was the reason for that alleged treatment.

48. Whether a belief is reasonable – this is to be assessed by reference to "what a person in their position would reasonably believe to be wrongdoing": *Korashi v Abertawe Bro Morgannwg University Local Health Board*[15].

49. The Court of Appeal in *Chesterton Global Ltd & Anor v Nurmohamed & Anor*[16] confirmed that "public interest" does not need to relate to the population at large but might relate to a subset: in that case a category of managers whose bonus calculation was negatively affected. It seems however that "public interest" cannot simply relate to the interest of the person making the disclosure.

50. The causation test for detriment is whether the alleged protected disclosure played more than a trivial part in the Claimant's treatment (*Fecitt v NHS Manchester*[17]).

51. So far as dismissal is concerned, pursuant to subsections 108(1) and (3)(ff) ERA, the Claimant is not required to have two years' continuous service if he can show that the reason for dismissal is that he made a protected disclosure, or more than one. Thus, contrary to the usual state of affairs, it is for the Claimant to show the reason for dismissal and that it is the impermissible one on which he relies, and not for the Respondent to show the reason and that it was permissible.

<u>Assessing truthfulness</u>

52. It is frequently very difficult in making findings of fact to tell whether a witness is telling the truth or not. We have borne in mind that the fact that a witness has lied about one matter does not necessarily mean that he or she has lied about another; and that when considering the credibility of a witness, it may be essential to test their veracity by reference to the facts proved independently of their oral evidence, in particular by reference to the documents in the case and by having regard to their motives and the overall probabilities[18].

53. We did not raise and were not addressed on the timing of the claim. However, it seems that since the Claimant commenced the Early Conciliation process on 1

[15] [2012] IRLR 4
[16] [2017] EWCA Civ 979
[17] [2012] ICR 372, CA
[18] See for instance Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1*; Gorgeous Beauty Limited v Liu* [2014] EWHC 2952

October 2021, he would be out of time to bring a complaint relating to anything occurring on or before 1 July 2021, which would include his dismissal, unless such act or omission formed part of a continuing act ending on or after 2 July 2021 and/or if (in the case of discrimination) the Claimant was able to show that it would be just and equitable to extend time or (in the case of detriment/dismissal) he could show that it was not reasonably practicable to bring the claim in time and that he brought it within such period thereafter as the Tribunal would consider reasonable. In light of our findings below, we did not ask the parties to return to address us further on this point.

Findings of fact

54. The findings of fact set out below are all made unanimously.

The Respondent's business operations

55. The First Respondent is a UK-based company registered at Companies House, incorporated on 12 March 2018 and wholly owned by TripActions Inc. The parent Company is what is commonly known as a "tech start up", founded by Ariel Cohen and Ilan Twig in 2015 and headquartered in Palo Alto, California. Mr Cohen remains as the CEO and Mr Twig the CTO. TripActions Inc has or has had sales regions in North America (East), North America (West), Europe, Middle East and Asia ("EMEA") and Asia Pacific ("APAC").

56. At all material times, clients of the First Respondent and parent Company were "segmented" according to different value brackets by reference to the number of employees in that client company: (from low to high) SMB, Commercial, Mid-market, Enterprise and Marquee. We heard that in EMEA, Marquee clients, of whom there were only one or two at relevant times, were dealt with by the Enterprise team. The number of employees in a client company could itself be gleaned by reference to the professional networking and contact site, LinkedIn. We also heard that the account management software used by the First Respondent, called SalesForce, was able to extract this data automatically from LinkedIn although entries, including as to key contacts, could also be made manually.

57. The Second Respondent joined the First Respondent in or around January 2020 as the CRO and remained in that position until the end of February 2022. The global scope of his role meant that all the sales teams reported to him. According to Mr Funge's statement, which was not challenged, the EMEA team was not established until around June 2020 and Mr Funge was the first Enterprise Accounts sales representative.

58. Prior to the Second Respondent's arrival, the US sales teams had pursued opportunities wherever in the world they arose. Mr Williams, who had worked out of the New York office since November 2018, described the situation as the "Wild West", from which we infer he meant there was little regulation over or control of the way opportunities were allocated and consequently how commission was earned.

59. The Second Respondent's arrival however saw the introduction of written Rules of Engagement ("Rules"). In essence these required consideration of three factors to establish which sales team should pursue an opportunity. The factors are the location of the client's Economic Buyer, its Champion(s) and its likely launch. According to the Rules:

    a. The Economic Buyer is the person – usually there is only one - with discretion over funds; when they say "yes", others make it happen.

    b. A Champion is an individual with power or influence who sells for the Respondent within the client's business. There may be multiple Champions in a deal, and indeed the building of multiple Champions is an "action" within the Rules.

    c. "Launch" refers to the successful implementation of the deal; decision-makers or "DMs" are responsible on the client side for that launch and may be based across several different regions, so that more than one sales team may be involved.

60. The three factors or "dimensions" also govern the split of sales credit if more than one team is involved, with the factors initially dividing the credit into thirds and then each third is capable of being further subdivided based on the location of the DMs involved. If credit splits cannot be agreed between the sales team leaders, it is open to them to escalate the issue to Sales Operations or to the CRO, i.e. at all relevant times the Second Respondent.

61. The Deal Desk is a team of people working for TripActions tasked with supporting employees in structuring and closing deals. The person with ultimate oversight of the Deal Desk is Mr Zakiyan. Sales calls are usually recorded using "Chorus" software.

62. It was common ground before us that while the Rules state account reassignment is "allowed" if the factors require it, in fact such reassignment is mandatory. In other words, the sales teams were required, not merely permitted, to establish the relevant location of each factor and hand over a client or opportunity if the factors were predominantly or exclusively suggestive of another sales team being the applicable one. There were business reasons for this, again not disputed, including the team's knowledge of the local market and physical proximity to the client ensuring that the latter could access sales calls and support within their own time zone.

63. The First Respondent's employees use the acronym TBUM, standing for Travel Budget Under Management, to describe a client's anticipated expenditure. The Second Respondent's unchallenged evidence was that prior to COVID, which self-evidently had a huge negative impact on the travel industry, TBUM was calculated according to the value of the previous year's spend. However, from 2020 onwards, it was calculated according to the estimated spend, which itself was worked out by reference to actual spend in 2019.

64. The Customer Program Confirmation ("CPC") form is an internal TripActions document used to capture high level information from the client which will then feed in to the estimated TBUM and form the basis for a formal quote. The client is asked to complete the form accurately and to the best of their knowledge and to sign it, although it bears a disclaimer confirming it is not legally binding.

The Claimant's engagement by the First Respondent

65. The Claimant was headhunted for his role. Prior to his engagement he was interviewed by the Second Respondent (and by Mr Cohen), on at least one occasion over Zoom, and engaged with effect from 12 October 2020. His team covered opportunities in EMEA in the Commercial and Mid-Markets segments, i.e. selling to clients with between 36 and 3,000 employees.

66. Sales Development Representatives in each team were tasked with setting up meetings for Account Executives. In the EMEA team, both those positions reported to the Claimant. The Claimant himself reported to Mr Chris Vik, Senior Vice-President EMEA, who in turn reported to the Second Respondent. In conjunction with the Second Respondent, Mr Vik was responsible for hiring the Claimant.

67. The Claimant had a basic salary of £150,000 per annum with a potential for a further £150,000 in accordance with a bonus scheme that is expressly stated in his contract to be discretionary. He was entitled to statutory notice i.e. a week a year for each complete year of service (save that he was entitled to two weeks' notice after three months and for the first two years) up to a maximum of twelve weeks after twelve years' service. The Respondent's handbook incorporates references to a code of conduct, including a whistle-blower scheme. The Claimant signed for the handbook and the separate code of conduct on the same date that he signed his employment contract (11 September 2020). On joining, the Claimant was awarded 80,000 stock options.

68. In February and March 2021, the Claimant received confirmation of how his commission would be calculated. In broad terms, the Claimant's discretionary commission was based on the aggregate of the commission earned by his Account Executives. The Tribunal understands these included Mr Harry Bourner, Mr Sebastian Gschwandtner, Ms Silvia Signore, Ms Isabel Gudenus and Mr Jack Wilson.

Colin Doyle

69. Also working in the EMEA team in the UK and reporting to Mr Vik was a colleague Mr Doyle, who joined the Respondent in June 2020 with the responsibility for Enterprise clients (i.e. those with in excess of 4,000 employees). Mr Doyle was appointed as a Senior Account Director but was promoted in November 2020 to Major Enterprise Account Director and again to Regional Director in May 2021. Mr Doyle received 20,000 stock options on joining the Respondent and a subsequent grant of 11,157.

May 2021 investigation

70. It was Ms Zuluaga's evidence that in the first half of 2021, the Sales Operations teams noticed and flagged what appeared to be inflated levels of TBUM from within the EMEA team. According to her witness statement, once Sales Operations were notified, they involved HR and Legal. There was a concern that if anticipated TBUM was set at an artificially high level, but not matched by the account's performance, potential revenue and hence commission would also be at an inflated level.

71. Ms Zuluaga said that there were also concerns about two specific deals, for companies ML Academy and ML Operations, to one of which the Claimant was or had been an adviser. The concern was that these deals had closed unusually quickly: after one day into the sales cycle (30 April 2021).

72. On 11 May 2021, an email was sent to several senior executives at TripActions: Mr Tuchsherer (a director of the First Respondent based in the USA), the Second Respondent, Mr Cohen and Mr Twig. The email originated from a Gmail account ("whistleblowermichael") and purported to be from a Michael Goldmann. We accept that no such person is employed by the First Respondent or the US parent.

73. The subject of the May 11th email was "Whistle-blower ML Academy + ML Operations EMEA" and it asserted that the Claimant had been responsible for fraudulent activity on those two accounts. It alleged that the purported value of the deals ("in the amount of +$10 million") was nowhere near the true amount of spend and that it is a "clear case of fraud and embezzlement", with the Claimant "having gone to extreme lengths to conceal his tracks". Although it started, "I'd like to bring to your attention fraudulent activity…" it ended: "We wouldn't be surprised if there are more cases of such instances with other business that fall under Faisal and highly recommend you to investigate with a fine-tooth comb".

74. It was put to Ms Zuluaga that the "May investigation" came about solely as a result of that email on May 11. She denied this and explained that a team comprising Ms Anna Padgett, Senior Legal Counsel (Employment), Ms Caro van Dijk (People Success Business Partner, EMEA), Mr Victor Madrigal (IT data collection), Mr Ri Capati (IT data review/analysis), Mr Zakiyan and Ms Zuluaga herself had already been assembled to look into the question of TBUM inflation and the ML Academy/ML Operations deals. There was an email in the bundle to these participants which is dated 12 May 2021.

75. Mr Sykes challenged Ms Zuluaga repeatedly as to this aspect of her evidence on the afternoon of Friday 23 September. Ms Zuluaga repeated that there had been a list of flagged deals for investigation, circulated prior to the 11 May email, which Mr Sykes did not accept and, as we have noted above, he said the existence of the list went to Ms Zuluaga's credibility.

76. On Monday 26 September, on the Order of the Tribunal, Ms Zuluaga produced what she said was the list in question, on which eight deals are flagged red/risk level 3 (apparently on a scale of 1-3). The deals in question are with: Graphcore Limited, pemllc.ae, H-Resa, naviswiss.eu, Energy Aspects, Select Model

Management, ML Operations and ML Academy, all involving the Claimant's reports. Four further deals (Advanced Software, Kapsch TrafficCom AG, Springer Nature Limited and Primark) were flagged amber (risk level 2). Advanced Software and Primark were Mr Doyle's deals while Springer Nature was Mr Funge's.

77. We accept Ms Zuluaga's evidence on the timing of the investigation because firstly it is clear that the scope was far wider than just the conduct of the Claimant and/or the ML deals, and secondly, it was underway before the email was received. The Claimant himself indicates in the "Timelines" he has produced in the bundle and which are said to have been drafted at or around the end of June 2021 that the Second Respondent and Mr Vik held a string of meetings on 10 and 11 May into alleged cheating in the compilation of CPC forms and fraudulent deals.

78. We do not accept that the reference to CPC in the notes about the naviswiss deal has been inserted for the purposes of clarification for the Tribunal. Mr Sykes asserted this was evidence that it had been produced during the Hearing. On closer examination however, it is clear that in fact the notes are quoting the explanation of the CPC form that Mr Bourner gave to the client.

79. Ms Zuluaga's evidence is also consistent with what she told Ms Whitehead in the Claimant's appeal ("End April/early May … Sales ops had noticed there were deals closed in EMEA with inflated TBUM. …Sales ops looked at stats and chorus recordings. … Deals in Q4-Q1. Had not seen any other inconsistencies in other regions, only with EMEA team. Some of those deals under [the Claimant's] team…Legal and People started an investigation"). She has not just raised the Sales Operations concerns in evidence before the Tribunal.

80. The Claimant also raised in his witness statement concerns as to whether the 11 May email was "real or created for a purpose". It is clear that the author has some inside knowledge of the Respondent's operations and the Claimant's role but also that they have wanted to conceal their identity for reasons which we cannot guess at and which we do not consider relevant to our findings in any event. We also do not attach significance to the initials KR that appear at the bottom of the email; they are a common abbreviation for "Kind Regards".

81. Therefore we do find the email was real and we do not accept that it was created by the Second Respondent and Mr McGrail, as Mr Sykes put to the Second Respondent in cross-examination, because there is no evidence of such creation. Had the Second Respondent created it alone or with another person, we consider it highly unlikely that the events of the following week would have unfolded as they did. Nonetheless, although in evidence the Second Respondent said he paid little regard to the email of 11 May, we find it very likely that it will have had a lingering influence and left a question mark in his mind about the Claimant's probity.

82. Having looked into the deals being concluded by all members of the EMEA team, including Mr Doyle's Advanced deal, the investigation decided, according to Ms Zuluaga, that while there was no evidence of intentional TBUM inflation in order to receive higher commission payments by those in the EMEA sales team, there were

discrepancies in the deal values. Ms Zuluaga said in her witness statement that she considered these could be explained by "gaps in enablement and a lack of guidance or expectation setting" from EMEA leadership, namely the Claimant and Mr Vik.

83. It was concluded that the EMEA team generally would be given the "benefit of the doubt" but that a watch would be kept on its members' practices. In addition, Ms Zuluaga said there remained concerns that the Claimant specifically was influencing what she described as "inaccurate outcomes" but the situation would be monitored rather than commencing disciplinary proceedings.

84. The Second Respondent agreed with this evidence. He says that he was disappointed that the team, whether or not intentionally, had been violating the Rules but that he endeavoured to make it "crystal clear" that everyone would be expected to operate in line with the Rules henceforward. On 17 May 2021, he addressed the entire EMEA team in an "All Hands" call.

85. The Claimant says that the Second Respondent apologised to the team and said that somebody had changed the CPC form without his knowledge; and that he also said that nobody would be fired or have their commission clawed back as a result of the investigation.

86. For his part, the Second Respondent says that his apology followed Mr Vik having been what he described as "accusatory and quite aggressive" on a team call which it had been brought to his attention had "rattled" some of those who had been interviewed, and particularly those for whom this was only their first or second job. This evidence is corroborated by the Claimant's own Timelines document (in which he says that Mr Vik had said "this will be a fireable offence and not acceptable" in a team meeting with the full sales, marketing and sales enablement teams) and by an email dated 12 May 2021 from Ms Padgett to Mr Vik.

87. Ms Padgett castigated Mr Vik in the email for having held meetings with the Account Executives, discussed the content of the allegations into which the investigation was being conducted and threatened them with discipline, having not been given prior approval or direction to do so either from his own leadership or the investigation team. The Claimant's Timelines document confirms that he also told Mr Vik that he should not have said what he said in front of the whole team.

88. The Second Respondent agrees that he said nobody would be disciplined or terminated following the May investigation. Nonetheless, we find that notwithstanding the Second Respondent's indication on the 17 May call that, in effect, a line was being drawn in the sand, he did in fact continue to ruminate on underlying suspicions as to the TBUM inflation and the Claimant's ML deals. It is also apparent that the Second Respondent remained suspicious of Mr Vik, not least in terms of his ability to direct the EMEA team appropriately.

89. It is unclear whether the Claimant accepts that the May meeting (referred to subsequently as the "CPC incidents and investigation") was a "line in the sand" for

both a) TBUM and b) the Rules, rather than just the former. The Second Respondent thinks he was very clear on both, but he may not have been, even if that was his genuine intention and is his genuine recollection.

90. We consider that it may not have been as clear as the Second Respondent thinks in terms of precisely what was covered, but regardless of that, we find that from that time on, the Claimant and his colleagues were on notice of what was and was not acceptable to the First Respondent, whereas hitherto they may possibly not have been. For instance, the Claimant himself is recorded as having said on 1 July to the Second Respondent, "I didn't get any direction… till May" and Mr Bourner as having said: "After the investigation the process was explained clearly. I didn't know till May… clear, got instructions from [the Claimant] and yourself".

Additional stock option grants – June 2021

91. Despite the underlying tension that we find remained at least in the mind of the Second Respondent, it was decided in around the third week in June 2021 to provide further grants of stock options to almost all the EMEA team members, in a move described as an attempt to boost morale and reduce attrition. The Second Respondent put forward to the US parent the details of what he was proposing and we accept that Mr Cohen authorised those grants without amendment.

92. Following or at a lunch on 25 June with the Second Respondent, the Claimant was told he would receive a further 50,000 options, second only to Mr Doyle, who received a further 125,000. We find that this reflected Mr Doyle's closing of some major deals including, at the end of April 2021, one with Heineken, said to be at the time and even now, the largest deal in the Respondent's history. Mr Zakiyan had looked into this deal, flagged as green/risk level 1, in the May investigation and confirmed the prior year's TBUM at the same rate as that at which the deal was closed. In addition, there was anticipated roll out in 70 countries.

93. The Second Respondent emailed the Claimant on 27 June 2021: "I am following up on our conversation Friday. I'm happy to confirm that you will receive 50,000 options with vesting effective June 26th. You've hired well and built a strong, cohesive team. Congratulations and let's go!!" Mr Vik received no stock options in this wave.

Jessica Roman stock options

94. In April 2021, according to Ms Zuluaga, TripActions Inc had hired a Regional Director of Enterprise Sales, Ms Jessica Roman, in California. Ms Roman was awarded 200,000 stock options on her engagement by the US company. We heard no details from any party as to the rest of her terms and conditions such as salary. However, Ms Zuluaga's evidence was unchallenged when she said that like Mr Doyle, Ms Roman led a larger segment ("Enterprise") and had significant prior proven experience and that "global compensation methodologies" tended to provide larger equity grants to those based in the US and in particular California, due to the relative value placed on equity within the local talent market.

95. In late June 2021, it appears the Claimant discovered the award to Ms Roman by chance at around the time he and the rest of his team (and Mr Doyle) received their "refresh grants". Of the three of them (the Claimant, Mr Doyle and Ms Roman)

the Claimant now held the fewest options at 130,000, while Mr Doyle held 156,157 and Ms Roman the 200,000.

96. It is clear that this differential rankled with the Claimant. On or around 26 June 2021, he spoke to Mr Vik about it and the following day brought it up again, this time with the Second Respondent. Mr Vik told the Second Respondent on more than one occasion that the Claimant had said a Mr Phan had told him about Ms Roman's allocation. The Second Respondent says that when he asked the Claimant how he had come by the information, the Claimant changed his answer, saying either that it was on the screen of a member of the finance team during a Zoom call or that somebody on the sales team had told him. In his grounds of appeal (to which we return below), the Claimant said that he had told Mr Vik that "someone" had shown him a tab on their computer.

97. In the particulars of claim, the Claimant said he did not reveal the name to the Second Respondent because he didn't want to get Mr Phan into trouble. In fact it appears that it could not have been Mr Phan who told him because Mr Phan did not know himself – or if he did, he must have found out from someone else, as he was not authorised to know that detail.

Investcorp deal

98. In early June 2021, a US sales person, Ms Susan Linder, was alerted to the possibility of a deal for a new client, Investcorp, by a Customer Success Specialist colleague, Mr Herve Puault, who had joined TripActions in January 2020. Ms Linder and Mr Puault had previously worked together at a competitor of TripActions, and Mr Puault's accounts there had included Investcorp, who had been in touch to see if he could assist them.

99. Ms Linder emailed Mr Vik on the evening of 3 June to make the introduction to Mr Puault and, by extension, Investcorp. She said, "His contact is currently very low level but I think Herve can provide you insight into how to navigate the org and put you in touch with them". Following a brief exchange of messages, Mr Vik wrote asking Mr Puault to arrange a call and to include Mr Hassan. He said, "looks like it's a smaller fin serv company with close to 600 employees".

100. It is common ground that the headquarters of Investcorp is in Bahrain. As the Claimant noted in his witness statement, Ms Linder would not necessarily have been aware of the relevant location according to the Rules of Engagement and nor did she need to be. She was passing the contact on to the EMEA team. It also appears that once the Claimant was involved, Mr Vik played no further part in the discussions and hence would have had no opportunity to learn subsequently that all the relevant factors under the Rules pointed to the US, as we detail below.

101. There is no record of the internal TripActions call which was scheduled for 9 June 2021, but on the same date, Mr Puault emailed Ms Michelle Kaler, apparently his contact at Investcorp, to introduce her to the Claimant. He concluded, "Faisal will reach out to you to schedule a convenient time to initiate a discussion" and indeed the Claimant was also in touch by email, still on 9 June, to ask when it would work best for her to have a short introduction call.

102. Ms Kaler responded on 10 June thanking Mr Puault (who thereafter also took no active role in the discussions) for the introduction and saying that she would be involving her colleague, Marissa Mora. It was clear from the address immediately under Ms Kaler's email signature that she was based in Park Avenue, New York. The Claimant replied saying that he was based in London and that he would make one of any two options for the following week work. He copied in Mr Bourner from his team to set up a call between them all.

103. We find that Ms Kaler was a Champion because she was introduced specifically as a person who "desperately wanted to make a change" from their existing supplier, and while self-confessedly she was not an "influencer of decisions", she had support to "push for change". In other words, she would be the person (perhaps alone or perhaps with others) to "sell" TripActions to her colleagues in the local team and HR at Investcorp.

104. We also find that Ms Kaler was based in the US. Further, we find that the Claimant could not have failed to be aware of that fact. We also find it unlikely – because it would have been unnecessary - that he would have referred to his own location if it was the same as hers. Ms Kaler's follow-up email indeed observed that she was working in the EST time zone and the invitations to the subsequent Zoom meetings have separate US and GB passcodes.

105. Mr Bourner duly arranged two meetings for the early morning of 17 June 2021: the first was between him and the Claimant only, while the second also included Ms Kaler and Ms Mora. There is a lack of clarity as to how long the Claimant spent on that call with the two Investcorp contacts which started at 14.00 UK time. The Claimant says in the claim form and in his witness statement that he had another call starting at the same time. Mr Bourner was slightly delayed from joining the call with Investcorp and therefore the Claimant excused himself briefly with his other client and joined the Investcorp call where he says the participants were muted and he took no part. After a minute, Mr Bourner joined and introduced the Claimant as his manager. The Claimant explained he had another call and asked if he was needed; Mr Bourner said he was not, so the Claimant left.

106. A second call was arranged for 21 June. There is what appears to be a partial transcript in the bundle. It is relevant to observe that while the Claimant was not apparently on that second call (although he had ticked the invitation to accept it), Mr Bourner, in demonstrating the TripActions product, refers to him as "Faisal, who was on the call last week" and later "let me speak to Faisal cos I know you mentioned Faisal was on the call last week".

107. It is further relevant to note that later in the call, Ms Kaler says to Ms Mora of the product that Mr Bourner demonstrated: "… this is a good tie in with our new ESG initiatives… we could sell this" and, "I am the lowest point on the totem pole and my goal is just to be able to go to our HR and say we have a real problem with our travel agent, but I've done this work. You should talk to Tripactions because they hit all the points that we need… I know it's going to come down to whatever that

one time or annual fee is. Because they tend to be frugal about these things but if I were to say to them, look, we're going to save 7%. … It just really comes down to whatever that platform fee is". In other words, she reinforces that she – and also potentially Ms Mora - are Champions.

108. Following the call on 21 June Mr Bourner emailed Ms Kaler and Ms Mora, copying in the Claimant, as follows:

"Commercial offer for Investcorp (After speaking to Faisal Hassan – VP EMEA – due to the mutual benefit of this potential partnership – we have waived off the $2,500 implementation/ and reduced the Annual Subscription fee by 50% - we suggest launching this initially with 10x users…)".

109. It is clear from the last moments of the conversation earlier that day and from this email that Mr Bourner knew the users – and hence the launch – would be based in the USA because the users that were being discussed were members of the New York real estate team in Investcorp. Thus it is also clear that the second factor – launch – was indicating that under the Rules of Engagement, the deal should be handed over to the New York sales team because now there was a preponderance of factors in their favour notwithstanding that the initial contact had come from New York to EMEA.

110. Further, it is apparent that Mr Bourner – and hence the Claimant, with whom Mr Bourner had discussed the details – were mindful that scaled up across Investcorp's user base, this could be a very valuable deal, which would of course benefit not only the Respondents but also the individuals involved, through commission.

111. Following a further exchange of emails the following day, on 23 June 2021, Ms Kaler wrote to Mr Bourner saying "I would like to introduce you to Mike Flanagan. He is the head of our corporate general services for the New York office, and is ultimately the one who makes final decisions on any changes to our service providers…". Mr Bourner wrote quickly back indicating that he had an opening to discuss the deal with Mr Flanagan "on Friday" (i.e. 25 June) and gave a potential timeframe by reference to the New York time zone. Mr Flanagan responded, copying in the Claimant and thanking Mr Bourner. Mr Flanagan's email signature shows that he, like Ms Kaler, is based in Park Avenue, New York. It gives his title as "Principal – Head of Corporate General Services".

112. We find that this email exchange will have indicated to Mr Bourner and to the Claimant that the third of the three determinative factors under the Rules of Engagement – location of the Economic Buyer – was also New York and hence without doubt required them to hand over the discussions to the New York sales team. It is irrelevant that the headquarters of Investcorp are in Bahrain and/or that the CFO Mr Back is based there, as set out in the Claimant's witness statement. On the evidence before us, Mr Back was not involved in this deal at all.

113. While we accept that in the very initial stages, both Mr Bourner and the Claimant might have been unaware of the location of all three factors that were

determinative of the correct team to handle the Investcorp deal, this was no longer the case by the afternoon of 23 June 2021. It was not the case, as asserted by the Claimant in his grounds of appeal, that either Ms Linder or Mr Puault had given them any information about the contact being in Bahrain or that Ms Kaler advised Mr Bourner to contact Jan Erik Back, the Bahrain-based CFO. On the contrary, as set out above, she expressly said that the decision would be Mr Flanagan's and made no mention at all of Mr Back.

114. Further, neither Mr Bourner nor the Claimant could reasonably have imagined the client was waiting for sign off from Mr Back. The size of the deal they were actually doing – to which we return below – obviously fell very far short of the thresholds that would require the signoff from a CFO, even if a future deal might very well be a) based in EMEA and b) sufficiently large as to require "C-level" approval. The "quote detail" screenshot in the bundle (where Mr Bourner is the Sales Rep and the Claimant the Approver) also shows only Mr Flanagan's details as both primary and billing contact.

115. Indeed, Mr Bourner said in his disciplinary hearing "I messed up. Button [presumably, bottom] line is that I had to bring in US people. I didn't do that. … I expected this to become an EMEA deal when we got to the next phase. That would have happened in the next meeting. We agreed that they would introduce me to EMEA folks after the deal was signed".

116. As to the size of the deal, Ms Kaler indicated that the real estate (RE) team had "22 travelers and approximate $.5 million annual travel budget" (also that there were 150 people in the New York office but she did not know how many of those were travellers). Mr Bourner replied that he was basing the deal on 22 active users, but at 50% capacity, so his quote was for $5 per month per user, or $600 for ten users for the year.

117. Early (UK time) on the morning of 28 June 2021, Mr Bourner had a further conversation with Investcorp. We find on the balance of probabilities that the Claimant did not attend that discussion; he was invited, but on this occasion did not accept the invitation, according to the calendar. The call took place on Zoom and a very limited transcript is in the bundle. It is headed "Transcript of Zoom call with Harry Bourner (HB) and Michael" (also suggesting that whoever has listened to and transcribed the call does not hear the Claimant attend). Mr Bourner opens the discussion by saying (referring to the Chorus recording) "Turn that off. Bit like Big Brother's watching you". After greetings between him and Mr Flanagan, the recording ends.

118. Ms Balmer's submission is that Mr Bourner must have been asking the Claimant to turn the recording off because Mr Flanagan, as an external user, would not have had the facility to do so. We consider it more likely that Mr Bourner was thinking aloud, suiting his actions to his words, and turned off the recording himself. Had the Claimant been on the call, we find on balance of probabilities he would have been heard during the greetings that then ensued before the recording ceased.

119. During the meeting[19], Mr Flanagan forwarded a document to Mr Bourner, which he in turn forwarded to the Claimant, by attachment to an email entitled "2019 spend". Later the same morning, Mr Bourner submitted for approval a quote for the Investcorp deal. The quote gave an annual contract value of $900 for 15 users, in line with the discussions Mr Bourner had been having by email with Ms Kaler. However, the TBUM was quoted at $3.3 million. The contract was scheduled to start two days later on 30 June 2021 and to run until 29 June 2022. Anticipated close for the deal was 31 July 2021. Significantly, in light of the discussions that Mr Bourner had had with Ms Kaler, the Travel Edition product was to be discounted by 50% and the Business Implementation Package to be written off altogether.

120. We accept the evidence of the Respondents' witnesses that as a consequence of the percentage write-offs involved in the deal (and not the value), approval up to a very high level (Mr Bartok, a director of TripActions Inc) would be required. The Claimant and Mr Vik immediately approved the deal and it went next to Mr McGrail, Senior Vice-President, Sales, based in the US. He replied "Pls include deal justifications. We can't approve without those. Thanks". It appears that the deal was not progressed further.

121. In a Sales Operations team announcement later on 28 June, it was confirmed that as the Respondent had previously indicated, there should be no "forecasting future acquisitions, expected growth" and that customers should be filling out a CPC signed by a CFO or person with a senior finance role. As we have indicated above, whether the Investcorp deal was valued by reference to the 15 users in scope (at $900) or by reference to Ms Kaler's approximation of $500,000, the TBUM was nowhere near the $3.3 million that Mr Bourner had written on the quote.

122. We do not accept the Claimant's assertion that discussions were still at the "discovery stage" nor (if asserted) that he could have thought they were. It is clear that Mr Bourner and, by extension, the Claimant anticipated closing the deal for 15 users in the US real estate team of Investcorp within the next month, and starting the service sooner than that. This was to be a way for the EMEA team to open the door to a wider deal, the value of which might very well have been $3.3 million based on the number of employees Investcorp had globally (2,598 according to the quote email). However, both men knew or ought reasonably to have known that a TBUM of $3.3 million was wildly out at this stage. Similarly, even the Claimant's assertion in his particulars of claim, made with the benefit of hindsight, that "the opportunity was worth $7.4m against a typical client TBUM spend of $1m" is manifestly wrong.

123. The Claimant's witness statement for an earlier hearing in this matter says, "Mr Bourner's discovery calls to the New York office of Investcorp were merely routine sales calls obtaining information about the EMEA-based company before approaching the decisionmakers at the head office. There was no question of Investcorp being characterizable as a US client. It was founded and based in

[19] The timings of several communications are difficult to follow because the senders and recipients are in different time zones but it appears the meeting was 07.00 to 07.30 UK time and the email is timed at 07.20.

Bahrain. There was no launch or champion in prospect at the time of the discovery calls." Save for the fact that Investcorp is based in Bahrain, we find that this evidence is wholly inaccurate.

124. Late in the evening of 28 June 2021, Mr Zakiyan contacted the Second Respondent regarding the Investcorp deal. He noted that while the client was based in Bahrain, all those with whom Mr Bourner and the Claimant were engaging with were based in New York, yet no sales representative from the North American sales team was involved. The majority of the TBUM associated with the deal was also, he said, in the US.

125. In the very early hours of the following morning (29 June 2021), Mr McGrail sent the Second Respondent a WhatsApp message saying, "*Investcorp – did Vadim [Zakiyan] ping you? It has some weirdness on it*". The Second Respondent replied, "*I'm all over it*". Mr McGrail said, "*OK thanks. Just woke up and got a bunch of txts w him*" [sic]. The Second Respondent responded, "*Oh yeah, there is definitely smoke. … getting to the bottom of it*." When Mr McGrail invited the Second Respondent to let him know if he needed anything, the Second Respondent said, *"Please ask Vadim to listen to the recordings and summarise. Specifically, is there evidence that Harry [Bourner] was talking with other contacts in London or in Bah'rain [sic]? And also, is there evidence that Faisal was involved in the deal or was it all Harry?*" Mr McGrail replied, "*On it*".

126. In light of the time difference, Mr Zakiyan would not be up for some hours, so Mr McGrail then said he was going to listen to the recordings himself. He sent the Second Respondent a summary later that morning saying "*6/21[20] 1st is a demo with two ladies in NYC. Faisal was invited and recorded. But didn't show up to the meeting. – yesterday – 2nd is a call between the head of general services at Investcorp and Harry – the guy is based in NYC as well. Harry turns the video off immediately after introductions saying "lets turn off the recording, big brother is watching". Faisal is also on the invest [sic] but didn't show up – email with Faisal approving discounts per Harry – can't find activity with anyone in Europe nor the Mideast. Faisal was introduced to the folks in NYC and explicitly called out there he is based in London. – He had a kickoff call with them and Harry. The chorus either failed, the recording was stopped or deleted*". As we have set out in our findings above, this summary appears to be accurate.

127. The Second Respondent asked Mr McGrail, "*when Harry suggest they turn off the video does the recording also stop?*" Mr McGrail replied, "*Yes. Stops right after he says that. Want me to send to you?"* The Second Respondent said, "*Wow. Yes. I think Harry has to go. Was Faisal ever on any of the calls?"* Mr McGrail: "*He is recorded in chorus and salesforce. But I don't see him make an appearance. … but it's clear he's on the deal. He was introduced to these ladies in NYC. His name is recorded. As he was on the invite I guess. But I don't see him speaking. Sent you the short chorus. Let me know if you want anything else. I can't find anyone that they have sold to in their region. I'll have Vadim double check when he's online*."

[20] I.e. 21 June – the date is written in the US fashion with the month first.

128. We find that at this stage, the evidence shows the Second Respondent had already made up his mind that he would dismiss Mr Bourner for his part in the Investcorp deal ("*Harry has to go*"). He was however reserving his position in respect of the Claimant while the gathering of evidence continued.

Events of 29 June 2021

129. On the evening of 29 June 2021, the England men's football team were playing Germany at Wembley in UEFA's Euro 2020. Events preceding, during and after the game are hotly disputed. In essence, the parties' positions are as follows:

    a. The Claimant says that he had no discussions with the Second Respondent about the Investcorp deal during the day. Their interaction was limited to a multi-party sales call and he, the Claimant, left around 11 am to take his son to the doctor, not returning before he went to the match. (He did however agree in cross-examination that he and the Second Respondent had had a further brief and unremarkable interaction that morning about looking forward to the game). He says that the Second Respondent consumed many drinks (wine, champagne and vodka shots) during the Wembley event and then asked the Claimant if he would like to share a taxi back to the centre of London where the Second Respondent was staying while in the UK.

    b. During the taxi ride, according to the particulars of claim, the Second Respondent "aggressively alleged the Claimant of breaking the rules of engagement" [sic], incorrectly asserting that the opportunity should have been handed over to the US sales team. When the Claimant complained of "discriminatory difference of treatment between himself and the US sales team" (the specifics of which are not given in the particulars of claim), the Second Respondent allegedly responded, "I don't care". In his witness statement, the Claimant says he gave examples of breaches by the US sales team, but again is not specific about what he says they were.

    c. The Claimant says that the taxi ride ended when the Second Respondent said to him, "I don't know if I can trust you. You can't control your people from calling outside your territory". The Claimant says he responded, "But will you be looking into Eugene and Kirk going after EMEA opportunities?", a reference to sales leaders Mr Eugene Godsoe and Mr Kirk Giddens, both based in the US sales team. At this, the Claimant says the Second Respondent became so enraged that he left the taxi at Barbican, still some distance from the hotel at which he was staying.

    d. By contrast, the Second Respondent says in his witness statement that he confronted the Claimant about "the violation", i.e. in not passing the Investcorp deal to the US sales team, "prior to the day of the football match and discussed it with him on several occasions over the course of two or three days on or around 28 June 2021".

e. The Second Respondent says that on the day of the match, he became aware that the Claimant had been on video calls and exchanged emails that would have identified the location of the participants (i.e. Ms Kaler, Ms Mora and Mr Flanagan). He challenged the Claimant on the afternoon of the match, i.e. 29 June, to which the Claimant replied that there was a "special agreement" in place with Mr Godsoe and Mr Giddens pursuant to which deals would be run outside the proper territory by account executives but then work out a split subsequently.

f. The Second Respondent denies that the Claimant alleged the US sales team had breached the Rules. The Second Respondent further says that when he contacted Mr Godsoe and Mr Giddens, they refuted the suggestion that there was a special arrangement in place; this was all prior to him leaving the London office for Wembley. He did not engage with the Claimant during the match but agrees that he suggested sharing a taxi back to Central London. He denies being inebriated in the taxi. He said in oral evidence that he does not drink vodka shots and does not much like champagne. He accepts only that he had drunk two or three glasses of wine while at Wembley.

g. In oral evidence the Second Respondent also accepted that he had left the taxi after discussing Investcorp with the Claimant. He denied that he was "furious" with the Claimant. He said however that the Claimant had "blatantly" or "brazenly" broken the Rules within a very short period after the May warning, and this caused him to be frustrated; he did not want to sit in the taxi with the Claimant either in silence or with the Claimant continuing to change his story.

130. We find on balance of probabilities that:

a. On 29 June 2021, during the day there was some discussion of the Investcorp situation. In the appeal notes, Mr Giddens is recorded as having said that he received a cryptic call from the Second Respondent about doing splits with EMEA. This, we find, was likely to be the call to which the Second Respondent refers following the Claimant asserting that there was a special arrangement between him and the sales leaders, specifically Mr Giddens and Mr Godsoe, in the US. This also fits the Second Respondent's evidence that the Claimant had raised this alleged "special arrangement" to him on the day of the match and before they had left for Wembley.

b. There were no protected disclosures made in the taxi on the way from Wembley into Central London after the match. As we have said, no examples of such protected disclosures were given in the particulars of claim; and in the Claimant's witness statement there is a reference to him having given the Second Respondent "examples" in the back of the minicab after the Second Respondent had accused the Claimant of having broken the Rules. Such examples were not specified even in the witness statement.

c. We find that the Claimant did however, during that cab ride, express a general sense of unfairness with how the US sales team was treated compared to those in EMEA. As Mr Sykes in fact put to the Second Respondent in cross-examination, the Claimant said he was treated unfairly by saying, "(Under your management) the NY Sales teams are breaking the Rules" and that the Second Respondent replied, "I don't care". We find it likely that the Claimant did say something along these lines and that the Second Respondent did respond that he did not care.

d. The Second Respondent left the taxi before reaching the destination because, we find, he was in a state of anger and was frustrated at the Claimant's responses. He had also been drinking, although the exact amount is unclear. We accept the Claimant's evidence that the Second Respondent swore and banged his fist.

e. Accordingly, we find that while the Claimant raised unfairness generally as he perceived it, he did not make a disclosure that had sufficient factual content and specificity such as was capable of tending to show a breach of a legal obligation.

Meeting on 30 June 2021

131. The Claimant says there was a meeting the following day at which the Second Respondent demanded to go through his laptop to investigate all the virtual paperwork connected with the Investcorp deal. He says that the Second Respondent, on discovering the deal was still at the discovery stage, lost interest but warned him, "If anything else comes up, then that's it". The Claimant says he gave the Second Respondent examples of three occasions when the US team had poached EMEA clients: Feedzai, Coralogix and Kraft Heinz. (We note that this is different in the agreed list of issues).

132. However, the Tribunal notes that according to the Claimant's witness statement:

a. Feedzai: this was a deal that was started in December 2019. It was developed by the US team – taking the Claimant's case as set out in his witness statement – in September 2020. So the initial contact was before the EMEA team was established and the development of the opportunity was before the Claimant joined.
b. Coralogix: this was demonstrated and the deal signed in March 2020, before the Claimant joined and, according to James Funge's evidence on the point, again before the EMEA team was established.
c. Kraft Heinz: according to the Claimant's witness statement there was a wholesale breach of the Rules which was disclosed only after the Claimant's dismissal. In his appeal in fact, the Claimant said that after he had been dismissed, the US sales team went to the EMEA team to say they had been working on a deal with Kraft Heinz and they "freaked out" and involved somebody from the EMEA team. Accordingly, it is unclear how the Claimant could have known enough detail to have raised it in June 2021. (The

Respondents' position is that Kraft Heinz was an Enterprise deal and therefore nothing to do with the Claimant's team in any event).

133. Further, the Claimant did not raise these deals either when he joined the First Respondent (e.g. in seeking to understand the territorial split) or in May 2021 when only the EMEA team was called to the meeting following the May investigation and given the "line in the sand" warning.

134. The panel considers that if the Claimant had been so concerned with what must have been (if true) an apparent injustice of management raising in May 2021 rule-breaking allegations only with EMEA, he would have raised it at that time with Mr Vik, or with the Second Respondent, or with someone even more senior, such as Mr Cohen. We do not accept the Claimant's evidence that he was aware of the breaches but decided not to raise them with the Respondents because he had a young family that he wanted to protect. This is not least because the Claimant said in answer to a panel question that he did raise two of the deals (Payoneer and Traxys) with Mr Vik when the split was made, the Claimant says unfairly, between the US and EMEA teams. There was no suggestion that this led to the Claimant being treated to his detriment.

135. The Claimant has also referred in his witness statement to commission splits being given to the EMEA team by their counterparts in the US only once the deal has been done and to those splits being unfair. He says the deals in question include Traxys, Showpad, Hypotherm and Payoneer.

136. It is clear from the Claimant's commission statements in the bundle that he was paid commission on each of these deals. It also appears that in each case except Traxys, the product was launched in more than one currency. The Traxys launch was in US dollars. Showpad, like the deals referred to above, closed (in July 2020) before the Claimant joined the First Respondent and again would likely have been at an advanced stage of discussions before the EMEA team was established. A document in the bundle shows that for Hypertherm [sic] the "top 5 folks" and "90%+ of org" were based in North America.

137. For both Payoneer and Traxys, the US sales team has copied the Claimant in to the suggested split of commission. In the former, signed in December 2020, Mr Tyler John, Senior VP of Sales in North America, says that there should be a split of 13.2% going to EMEA, while in the latter, Mr Godsoe says the EMEA split should be 22% (also copying in Mr John).

138. We accept Mr Zakiyan's evidence that if the Claimant had considered this to be the wrong value in either or both cases, the course of action would be first to engage the Sales Operations team (assuming the issue could not be resolved with the counterpart sales leader) and from there to escalate it if necessary to the Second Respondent.

139. Again, we do not accept that the Claimant knew about these matters and raised them with the Second Respondent as protected disclosures; he was raising his

sense of unfairness only when confronted with his own wrongdoing. If the Claimant knew about these issues at all, he must have known about them for a considerable period without raising them. Nor do we accept that he did not raise them previously through anxiety at potential repercussions for his young family.

Examination of the Claimant's laptop

140. The Second Respondent denied in cross-examination that at the meeting on 30 June he had required the Claimant to open his laptop and go through the contents. He said rather that he had invited the Claimant to do so if he had anything on it that could absolve him of culpability but that the Claimant did not do so. This is directly in contradiction to the grounds of resistance submitted on behalf of both Respondents in which it is pleaded, "*On 30 June 2021, [the Second Respondent] had a second meeting with the Claimant to discuss the matter. During this meeting, the Claimant's laptop was reviewed for messages between himself, Mr Bourner and Investcorp*".

141. The Claimant says it was unnecessary to get him to go through his documents relating to Investcorp on the laptop because everything was available to review on Salesforce. However, this is clearly not the case because, although they should have been available, the recordings had been switched off (or not started in the first place) and thus could not be listened to in their entirety or at all. We consider this makes it more likely that the Second Respondent will have asked or told the Claimant to go through the laptop to demonstrate what the Claimant knew about the deal. We therefore find that, whether at the Second Respondent's insistence or by his invitation, the laptop contents were reviewed.

142. In light of the findings we have made above as to the application of the Rules to the Investcorp deal and its imminent closure, we do not consider on balance of probabilities however that the Second Respondent would have accepted or did accept that the deal was at the "discovery" stage, or that he lost interest at any point in the matter following the exchanges with Mr McGrail on 29 June. Manifestly, having already decided to dismiss Mr Bourner and by 30 June also considering the Claimant's dismissal, the Second Respondent had decided, albeit without having completed a full and fair investigation, that the deal was far more advanced than that. He may not have said as much to the Claimant, but it is clear that he continued to be highly concerned about what he had uncovered in relation to the Investcorp deal.

Disciplinary hearing

143. A meeting took place on 1 July 2021. It was described as a "debrief" but in reality amounted to a disciplinary hearing. Questions had been prepared in advance to be asked of those attending: Mr Vik, the Claimant and Mr Bourner. We have found above that the Second Respondent had already decided that Mr Bourner's employment would be terminated. He had not yet, we find, reached a conclusion as to the Claimant or indeed Mr Vik. Questions prepared for the Claimant included what direction he had received from Mr Vik, and questions for Mr Vik included unrelated issues concerning his interaction with a colleague.

144. In the conversation on that date, when discussing the Investcorp deal, the Claimant is recorded as accepting that he knew Ms Kaler was in the US and that Mr Vik had

not directed him to exclude the US team from the deal. The Claimant said it was he who introduced Investcorp to Mr Bourner from an internal lead, and that on the first call he said hi, introduced Mr Bourner and handed over to him.

145. As to Ms Roman's equity, the Claimant says in his witness statement that it was a Mr Van Phan who told him about it and that it must have been transparent to the Second Respondent that he did not cause trouble for another employee by naming them. He accepts in the statement that he did tell the Second Respondent he did not recall who it was (i.e. was not truthful) but says this was because he did not want to implicate Mr Phan. (The Claimant later said in his grounds of appeal however that he was asked how he knew about Ms Roman's equity and that he did not recall. The Claimant also sought to assert in the grounds of appeal that he had behaved well in this instance, by informing the company of a privacy breach but that this had been twisted against him).

146. The outcome of the hearing was that both Mr Bourner and the Claimant were dismissed. The emails confirming the reasons for their dismissals were initially in the bundle in redacted form and later supplied separately, unredacted, as we have said above. They were identical in form and content. Mr Vik was not dismissed at that point. The Claimant, assisted by Mr Sykes, appealed his dismissal. Mr Bourner did not appeal. We return to the appeal below.

Documentary evidence

147. We have considered how reliable we consider two sets of documents to be: the Claimant's "Timelines" and the First Respondent's disciplinary hearing notes, taken during the 1 July meeting by Ms Van Dijk. The latter (and the documentation leading to the disciplinary hearing) are professionally poor by any standard. There is for example no evidence the participants were told it was a disciplinary hearing and as we have said it was somewhat disingenuously described as a "debrief" although the outcome of dismissal for Mr Bourner at least, even prior to the meeting, had already been determined.

148. We conclude that the disciplinary hearing notes, while not fabricated, are incomplete, confusing and poorly laid out. Indeed, they are so badly written that it is sometimes difficult to follow who said what and when, because we find that although the questions were pre-planned, not all the questions were asked of all the participants.

149. Nonetheless, we consider that the answers are not fabricated even if they are incomplete. What is put down is accurate as far as it goes. There is a perverse logic to Ms Balmer's submission that if the Respondents had decided to make up the notes, they would have done a better job of it. Further, it is not disputed that the questions were asked, and the Claimant in his appeal for instance is recorded as having said that Mr Bourner was bullied into giving one of the answers. He did not however dispute that Mr Bourner gave that answer in the first place.

150. Given the paucity of the answers recorded, it is also apparent that Ms Van Dijk was making only very brief notes so we accept the Claimant may not have been aware she was taking them at all. However, the recorded answers are consistent

with the limited documentation available. There is no record of the Claimant having raised issues either of race or of alleged rule-breaking in the US team and Ms Van Dijk confirmed when she spoke to Ms Whitehead about the Claimant's grounds of appeal that neither of those issues was in fact raised.

151. So far as the Claimant's Timelines documents are concerned, these are neither contemporaneous nor objective, though we would not expect them to be. They purport to start on 3 February 2021 but are extremely selective. It is highly probable that what is said in quotations is not precise unless the Claimant was making covert recordings which have not been disclosed. He purports to set out what was said in meetings that he did not personally attend and which, accordingly, must have been relayed to him by those who did, by inference without perfect accuracy. The Claimant accepts that he went back over the documents (e.g. calendar invites, emails) to which he had access until that access was removed, and he has interleaved those items with his recollections.

152. There are also manifest inaccuracies in the Timelines. For example, the Claimant says of the Investcorp deal and specifically the first call with Ms Kaler: "I was only aware of the initial introduction call (I was not aware it was with someone based in the US)"; but we have found above (paragraphs 102 & 104) that he could not have failed to be aware where Ms Kaler was based. In addition, he was very clearly more involved in the deal with Investcorp than he suggests in these Timelines. We place little reliance in these documents in consequence, where the evidence is disputed. That is not to say however that the Claimant has deliberately falsified these notes. It is more likely they are what he remembers having been said.

Appeal

153. At the appeal hearing, which was conducted by Ms Whitehead on 29 July 2021, the Claimant was accompanied by Mr Sykes. In their absence, Ms Whitehead also carried out a number of telephone interviews to clarify or explore what the Claimant had put forward in his written grounds of appeal and at the hearing.

154. The Second Respondent told Ms Whitehead that Mr Vik passed on the Claimant's disappointment with his equity share and the fact that Ms Roman had more stock options than him. The Claimant told Mr Vik that he had seen a spreadsheet from within the finance team so the Second Respondent spoke to a manager in the finance team, Mr Ghering, to ensure that Mr Phan, who reported to Mr Ghering, understood expectations around privacy. However, very shortly afterwards, Mr Ghering stated that Mr Phan did not have access to Ms Roman's details. At the appeal Mr Vik also confirmed, as noted above, that the Claimant had told him he saw it on Mr Phan's screen.

155. Ms Whitehead indicated that the Claimant was clearly upset by the issue and that he knew he should not be privy to Ms Roman's allocation. She explained that the issue was not in fact whether or how he knew – had he said he had seen it by accident on a particular person's screen, that would have been "ok" - but rather the fact that he had been evasive about it when questioned.

156. Ms Whitehead also interviewed Mr Giddens by phone. She records that she found him a very credible witness. He appears to have confirmed that the Second Respondent brought in the Rules of Engagement in around January or February 2020 and they became more "hard and fast" a month or two later, though we note that at that time there would likely not have been an issue between the US and EMEA sales teams, since the latter had not yet been formed. Mr Giddens said he had spoken to the Claimant early on about split commission. As we have noted above, he also confirmed that the Second Respondent had contacted him about whether there were any issues doing splits with EMEA. He showed Ms Whitehead messages on the Slack platform demonstrating how he and the Claimant worked together.

157. On 9 August 2021, Ms Whitehead emailed the Claimant setting out a summary of her findings in relation to his grounds of appeal and dismissing the appeal.

158. Mr Sykes put to Ms Whitehead in cross-examination that her notes were also fabricated. However, the panel observes that Mr Sykes was there at the appeal and finds that if he had had concerns that the previous notes were fabricated, he would have taken his own notes at the appeal. He would have produced them for this Hearing and this would have been raised in the Claimant's witness statement. As we have indicated above, this is an example of Mr Sykes making an assertion in an attempt to discredit a witness but without any apparent basis for so doing. We do not find that Ms Whitehead fabricated the notes.

Conclusions

159. For each complaint, our findings of fact above inform our conclusions and we do not repeat them all here.

Protected disclosure detriment/dismissal

160. Did the Claimant make qualifying public interest disclosure(s) within the meaning of s.43B (1) ERA 1996? We conclude that he did not.

    a. We have found that the Claimant did not say in the taxi that he shared with the Second Respondent after the Wembley game on 29 June or in a meeting with the Second Respondent on 30 June 2021 that the First Respondent's sales teams in the United States were intervening in the client opportunities of the Europe Middle East and Africa ('EMEA') team contrary to the Rules of Engagement globally applicable to sales staff, as alleged or at all.

    b. We have found that the Claimant made an allegation about fairness generally and that the Second Respondent said he did not care. We conclude that this was because the Second Respondent was focusing on the Claimant's own conduct and saw any allegation by the Claimant about the US teams as an attempt at a diversion, having already asked the US team managers earlier on 29 June about the special agreement the Claimant said they had between them and having been told no such agreement existed.

c. The Claimant's case as advanced in the pleadings and in cross-examination of the Respondents' witnesses was that he raised "fairness". That is also consistent with his evidence before us. He was contrasting those who were based in the US with those in the EMEA team and saying that there was a tolerance for the behaviour of the former that was not given to the latter; but that is not his claim. There was insufficient factual context and/or specificity given for what he said to amount to a protected disclosure.

d. We consider it is also pertinent that in the Claimant's own Timelines document, he does not refer to having raised any specific examples of the US team breaking the Rules with the Second Respondent during the cab journey.

e. At the appeal (page 305) the Claimant said to Ms Whitehead that he had blown the whistle on "July 1". He said the same in his grounds of appeal. We conclude that this is inconsistent with him having also made protected disclosures on 29 and 30 June (when he had not yet gone through the deals and did not have access to the documents he now has, following the Respondent's disclosure during the Hearing).

161. If so, did any of the alleged disclosures of information, in the Claimant's reasonable belief, tend to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject (s.43B(1)(b) ERA 1996)? We conclude that they did not.

a. According to the agreed List of Issues, the relevant legal obligation with which the Respondents allegedly failed or were likely to fail to comply was that the First Respondent's[21] sales teams would not intervene in the client opportunities in other sales territories, contrary to the Rules of Engagement globally applicable to all sales staff.

b. We accept that we can draw an inference that the Rules were applicable globally even though we do not have contracts for those based in the US. However, an allegation that the Respondents had "failed to control and prevent the conduct of the US team" would not amount to a disclosure of information that the Claimant reasonably believed at the time he made it tended to show a breach of a legal obligation to which the Respondents were subject. It makes no reference to any legal obligation, even if one existed. It is the expression only of the Claimant's opinion. It lacked factual content and specificity.

162. If so, were the alleged disclosures made by the Claimant in the public interest (s.43B(1))? The Claimant contends that the disclosures were made in the public interest by reference to the entire sales force of the First Respondent, as the alleged breaches by the US teams of the separation of sales territories and the global Rules of Engagement meant to govern the separation bore directly on the EMEA sales team's contractual income.

[21] We believe this should say the US sales teams

a. Even if this allegation was made, we conclude that it was not made in the public interest and nor did the Claimant believe he was making it in the public interest at the time he made it. Any such allegation was made, on the Claimant's own case, only as a direct response to the Second Respondent having already accused him of misconduct that the Claimant believed was being replicated and tolerated in the US team. It was at best exculpatory of the Claimant's own actions.

b. Some of the examples to which the Claimant says he referred pre-dated the establishment of the EMEA team in the First Respondent and accordingly any failure to enforce the Rules globally cannot have been contrary to the "public interest" where the "public" was a team that did not yet exist, and nor can the Claimant genuinely and reasonably have believed it was.

c. Further, had the Claimant genuinely believed that there had been a failure or failures to comply with the Rules by the US team, we have found that he had numerous opportunities to raise this with Sales Operations, Mr Vik, the Second Respondent or another member of the senior management team. The fact that he did not do so at an earlier stage supports the inference that he did not have the information necessary to discuss the examples on which he now relies.

163. Were the disclosures made to the Claimant's employer or to another person where the Claimant reasonably believed the relevant failure related solely or mainly to the conduct of that other person or to any other matter for which that person had legal responsibility pursuant to section 43C(1)(a)(b)(2) ERA? Although this is a moot point in light of our findings above, we find any disclosures that were made, were made to the Claimant's employer.

164. Did the Respondents subject the Claimant to any or all of the following alleged detriments:

a. on 29th June 2021 the Second Respondent being uninterested in the Claimant's complaints of the difference of treatment between himself and the US sales teams, who were permitted to break the rules of engagement by intervening for financial gain in EMEA client opportunities.

> We conclude that this is not factually correct. This is not what the Claimant said.

The Second Respondent allegedly said, 'I don't care.'

> We find that he did say this, but in response to an allegation by the Claimant of general unfairness in treatment between the two teams (US/UK), without specificity;

b. on or after 29th June 2021, the Second Respondent failing to advise the Claimant whether the Respondents would investigate the US sales team's conduct, and taking no step to remedy the Claimant's commission losses.

> We conclude that the Second Respondent did not tell the Claimant whether there would be any investigation into the US sales team's conduct but that this was not a detriment to the Claimant.
>
> The Second Respondent also did not take steps to remedy the Claimant's commission "losses" (if there were any) but we conclude that this was because the Claimant was making general accusations about the US team and gave no detail to the Respondents on that date.

c. on 30th June 2021, at a meeting, the Second Respondent humiliating and demeaning the Claimant by demanding inspection of his laptop and, in particular, of records of every email and meeting between sales executive Mr Bourner and an EMEA client opportunity Investcorp, when the records were available in the Salesforce database.

> We find that the Second Respondent did not humiliate or demean the Claimant by demanding inspection of his laptop, as he was entitled to do so. We accept that he asked to look at it firstly because he was distrustful of the Claimant and secondly because the records were <u>not</u> available in Salesforce (e.g. because of the recordings being turned off), although they should have been.
>
> In any event, the Claimant's case is that when he showed the Second Respondent what was on his laptop, the Second Respondent was satisfied by what he saw. That is not our finding - as we have said above, the Second Respondent was clearly <u>not</u> satisfied with what he saw; but had the Claimant been able to dissuade the Second Respondent of his involvement in the Investcorp deal, that would have been the opposite of a detriment because it would have been to the Claimant's advantage.

d. on 30th June 2021, during the same meeting, when the Second Respondent realised the Investcorp opportunity was only at the pre-sales discovery stage, him warning the Claimant, 'If anything else comes up, then that's it.'

> We have concluded that the Second Respondent did say this (or words to that effect), and that it was tantamount to a warning. However, this was not because he "realised the Investcorp opportunity was only at the pre-sales discovery stage" but because he had decided to dismiss the Claimant as well as Mr Bourner if further evidence came to light in relation to Investcorp.

e. on 30th June 2021, during the same meeting, the Second Respondent being uninterested in the Claimant's complaints of difference of treatment in respect of no action being taken against the US sales team leaders following their alleged serial and overt breaches of the rules of engagement for financial gain.

> We have concluded that the Claimant did not come close to making allegations of "serial and overt breaches" in the way alleged and hence that to the extent the Second Respondent was uninterested in comparisons between the UK and the US sales teams, this was not a detriment to the Claimant.

f. on 1st July 2021 at 12.30pm the Second Respondent holding a formal meeting with the Claimant at which he reversed his position and accused the Claimant of breaking the Rules of Engagement in relation to Mr Bourner's New York calls. The Second Respondent blamed the Claimant as manager for Mr Bourner's calls, despite not establishing, or attempting to establish, any knowledge by the Claimant of the content of the calls.

> We have concluded that the Second Respondent did not "reverse his position" and that he had established to his own satisfaction the Claimant's involvement in the Investcorp deal and the New York calls.

g. on or after 1st July 2021, the Second Respondent failing to change his position in relation to the allegations levelled against the Claimant above despite receiving further information from both the Claimant and Mr Bourner which, the Claimant alleges, ought reasonably to have led him to change his position.

> We have concluded that the Claimant and Mr Bourner gave no further information to the Second Respondent that could reasonably have led him to change his position.

h. on 1st July 2021, during the same meeting with the Claimant, the Second Respondent making a new and offensive allegation against the Claimant, namely that the Claimant was dishonest because he could not recall who told him Ms Roman's stock options were visible, while Mr Vik claimed he had said it was Mr Van Pham who told him.

> We have concluded that the Claimant <u>was</u> being dishonest when he said this, as indeed he has admitted himself, although he says it was for a good reason (namely to protect Mr Phan).

i. on 1st July 2021 at 7.45pm, at a second meeting, the Second Respondent terminating the Claimant's employment on grounds that: (i) the Claimant did not understand the commission split rules as he and/or Mr Bourner should have informed the US sales teams of the Investcorp opportunity; and (ii)

that the Claimant was allegedly dishonest in not stating who told him about Ms Roman's stock options.

The Claimant was dismissed, but we conclude that the reason for the Claimant's dismissal was not that he did not understand the commission split rules, it was because the Second Respondent believed the Claimant had knowingly broken the Rules shortly after being warned this would not be tolerated.

We consider it likely that the Claimant's dishonesty over Ms Roman's stock options was a minor part of the Second Respondent's decision to dismiss, the main factor, as with Mr Bourner's dismissal, being the Claimant's involvement in the Investcorp deal.

j. on 2nd July 2021 Kimi Zuluaga (Senior Manager, People Success) confirming the Claimant's dismissal but giving no right of appeal. The Claimant alleges that this was in breach of clause 21.3 of his employment contract and in breach of the ACAS Code of Conduct for disciplinary and grievance procedures.

We contrast a failure to "give" a right of appeal and a failure to highlight it. Ms Zuluaga did not highlight the right, but the Claimant was not refused it, as indeed he brought an appeal which was heard subsequently by Ms Whitehead.

k. on 2nd July 2021, Ms Zuluaga threatening that the Claimant would not receive his final pay including holiday pay and expenses unless he entered a settlement agreement. That was contrary to the contractual entitlement to reimbursement of business expenses by clause 9 of his contract, and holiday pay by clauses 14.4 – 14.5.

We consider there was unfortunate ambiguity in the words "final payment" and that this amounted to poor drafting, but in any event the Claimant was paid consistent with normal practice even though he did not enter the settlement agreement.

l. on 9th August 2021, by email, the appeal officer rejecting the Claimant's appeal against dismissal dated 5th July 2021, with detailed grounds on 13th July 2021. The Claimant alleges that Ms Whitehead rejected the appeal taking a prejudicial, perverse approach to the grounds.

While it is correct that the Claimant's appeal was dismissed, we do not find evidence that Ms Whitehead took the approach contended for.

165. If the Claimant was subjected to any of the alleged detriments above, were any such detriments done on the ground that he had made a protected disclosure (s.47B(1))?

We have concluded unanimously that to the extent the Claimant was subject to the detriments alleged, it was not because he had made a protected disclosure, or more than one. It was because of the Respondents' genuine belief in the Claimant's misconduct.

In any case, in his Timelines document, the Claimant posits that the potential reason why the Second Respondent wanted to reduce UK commission while agreeing US commission was to "keep UK money in the US for the stock exchange report figures". In other words, the Claimant himself appears not to have considered as at the date of his dismissal that the Second Respondent was motivated either by race (to which we return below) or by the Claimant having made protected disclosures in his allegation of difference in treatment between the Claimant's UK team and those of white counterparts in the US.

166. Was the reason for the Claimant's dismissal (or if more than one the principal reason) the fact that he made a protected disclosure?

Since the Claimant had less than two years' service, it is for him to show that it was.

We conclude that he has not done so; as with the reason for any proven detriments, the sole or principal reason for his dismissal was the Respondents' genuine belief in his misconduct. Even if the Second Respondent had the Claimant's complaint of unfairness in his mind at the time of the dismissal, that would not be sufficient to found a claim for automatically unfair dismissal. The Claimant has not come close to showing the reason for dismissal was the making of a protected disclosure, or more than one.

Direct race discrimination

167. We conclude that the correct comparator is, as Mr Sykes submitted, a hypothetical person who does not share the Claimant's race (black and of Somali/East African origin). That hypothetical comparator must also be in all material respects in the same position as the Claimant, save for not sharing his race. Thus, they must be an employee of the First Respondent, working in the EMEA team at Vice-President level. However we also consider that we can draw inferences from the treatment of Mr Bourner, Mr Vik, Mr Doyle, Mr Godsoe and/or Mr Giddens (on whom the Claimant in his appeal appeared to be relying), as well as Ms Roman (in relation to the stock options only). Their treatment may help inform the likely treatment of a hypothetical comparator.

168. Our general conclusions are that had the Second Respondent, alone or with Mr McGrail, concocted the 11 May email, he would then have pushed for the Claimant to be thoroughly investigated. He would not have allowed the investigation to drop. Further, he was in a position to direct the scope, target(s) and subject of the investigation, so we conclude that Mr Sykes must be mistaken in alleging that the reason why it was dropped was that Mr Doyle's integrity was called into question

and the Respondents did not want a white man to be implicated in any wrongdoing. Had the Second Respondent wanted to investigate only the Claimant there would have been ample scope for him to restrict it in that way. Indeed, that would have been the logical outcome if the Second Respondent was behind the email: to decide to restrict the investigation into the Claimant's dealings, using the email as cover. We conclude that this allegation is far-fetched.

169. Regarding the call on 17 June 2021, when asked in the disciplinary hearing to explain his understanding of the Rules of Engagement, the Claimant's reply is recorded as: "I just introduced Investcorp to Harry [Bourner], came from an internal lead. I told them that Harry would be handling it. It was just a 10 sec call. I said hi, introduced Harry, and handed it over to Harry. I knew Michelle [Kaler] was in the US". However, in the Grounds of Appeal drafted by Mr Sykes on the Claimant's behalf and therefore presumably on his instruction, the Claimant asserts that Mr Bourner's initial call to New York was "merely a discovery call… [the Claimant] was consequently unaware of it". In cross-examination he said he joined for a "split second" and logged off again. In his Timelines document he says that he was only aware of the introduction call and was not aware it was with somebody based in the US.

170. However, given the content of the Claimant's 10 June email to Ms Kaler about "making one of the options work" for an initial call, it would have been very surprising if he had not been involved at all. Indeed, although we entirely accept that the Claimant would not normally have been involved at the "discovery" stage and in particular when the size of the deal was so small, his willingness to become involved in this case was apparent (as we have said, likely because he could see how EMEA might benefit in future) and it would likely have been considered most discourteous if he had not attended and very odd if he had joined the call but not spoken.

171. Mr Vik told the appeal hearing that he believed the Claimant had been on the call for 15 minutes. Mr Bourner said in his disciplinary hearing "Faisal was on the 1st call, so I thought it was all OK". The Second Respondent has said that the Claimant told him variously he was on the call for 15 minutes, three minutes, one minute or 15 seconds.

172. On the basis of the inconsistencies in the written evidence before the Tribunal, some of which are internal inconsistencies in the Claimant's own case, we conclude it is likely that the Claimant was also inconsistent when he was asked by the Second Respondent about the nature and length of his involvement in the initial call.

173. Contrary to his own Grounds of Appeal, the Claimant was both aware of that call and present on it, even though the exact duration of his involvement is not something on which we consider we can (or need to) make an accurate finding. Accordingly it was not unreasonable for the Second Respondent to form a view as to a lack of trustworthiness regarding the Claimant and what he claimed was his part in this deal. The issue around who had told the Claimant about Ms Roman's

stock award also fed into this view, although as we have said above, we agree with Mr Sykes that this was clearly the lesser allegation so far as the Second Respondent was concerned. Even if it was unreasonable however, an unjustified but genuine reason for the Second Respondent acting as he did would be a defence to the allegation of race discrimination.

174. A lot was made by Mr Sykes of the Payoneer and Traxys deals in cross-examination of the Respondent's witnesses. We observe that Mr John, SVP on the former, is black (and we did not hear evidence of the race of the other team members in the US). This supports our conclusion that the "reason why" the Second Respondent was uninterested in the Claimant's complaints was not the difference in race between the Claimant and his US counterparts, the latter in any event not having been subject to the warning given to the EMEA team the previous month. It was because the Second Respondent had lost trust and confidence in the Claimant and was not listening to his protestations as regards fairness between the different teams.

175. The Second Respondent would also have had no reason to re-open or investigate deals done before the Claimant joined or even before the EMEA team was established, even if the Claimant had attempted to raise them. Many of the points now made by the Claimant a) can only be made by him at all because he received further disclosure after his dismissal but before or during the Hearing and thus would not have been known to him in June 2021 and/or b) relate to the "Wild West" days before the Second Respondent joined and implemented the Rules.

176. We have dealt above with whether, and if so, the "reason why" a number of alleged acts or omissions took place in considering whether the Claimant was treated to his detriment because of making protected disclosure(s). The same questions and hence the same answers are largely repeated in the list of issues in relation to race discrimination, namely, has the Claimant proven, on the balance of probabilities, that the following alleged acts or omissions took place (and if so, was any less favourable treatment because of race):

    i. in 2020 to 2021, the First and/or Second Respondents awarding the Claimant a lower and slower level of stock options (130,000) than other white Caucasian staff including Jessica Roman (250,000) and Colin Doyle (155,000);

        We accept Ms Zuluaga's evidence in this regard and conclude that the reason why Ms Roman was awarded more stock options than the Claimant was because equity is more significant in the packages awarded to the US employees than it is to the British teams. We have no details as to the remainder of her package and, for example, whether her base salary was higher or lower than the Claimant's.

        We also accept that the reason why Mr Doyle ended up with a larger total award was because although his allocation was lower at first, it

was increased to reflect the fact that he had brought in the biggest client, Heineken, for the First Respondent.

We also note that according to the Claimant's own Timelines document Mr Abdelouhab, the Vice President for South EMEA, was given over 160,000 options. Mr Abdelouhab had previously worked with the Second Respondent and hence his ethnicity would be known to the Second Respondent.

Mr Sykes asserted in cross-examination that Mr Abdelouhab is "light" skinned. The Second Respondent replied that Mr Abdelouhab, a man of Algerian nationality who lives in France, is a north African man and is brown-skinned. While he does not share the Claimant's race precisely in that he is not from Somalia, he is nonetheless an African male; he is not a white Caucasian.

We do not accept that the Claimant's lower total of stock options by the date of his dismissal can be ascribed in any way to his race. The reason for his grant and for the grants of others have been readily and credibly explained by the Respondents' witnesses.

ii. on 29th June 2021 the Second Respondent aggressively accusing the Claimant of breaking the Rules of Engagement in respect of the Investcorp EMEA client opportunity, during a drive back to London from Wembley stadium, when the Second Respondent was substantially under the influence of alcohol, without having established the Claimant had any responsibility for the matter;

We have set out above our conclusions on this allegation. For this and the other race discrimination allegations set out below, we are mindful that as the Respondents submit, the comparator would be someone who did not share the Claimant's race but who was in materially the same position i.e. who had been warned the month before this journey that no breaches of the Rules would be permitted and that such conduct would be dealt with strictly thereafter.

iii. on 29th June 2021, during the same discussion during the drive back from Wembley stadium, the Second Respondent was uninterested in the Claimant's complaints of the difference of treatment between himself and the white Caucasian US sales team leaders, who were permitted to break the rules of engagement by intervening for financial gain in EMEA client opportunities. The Second Respondent said, 'I don't care.';

We do not accept that the Claimant mentioned race during this discussion, or that the reason for any difference in treatment was because of it. We have set out above our other conclusions about this conversation.

iv. during the same meeting on 29th June 2021, the Second Respondent failing to advise the Claimant that the Respondents would investigate the US sales team's conduct, and taking no step to remedy the Claimant's commission losses;

We have set out above our conclusions about this conversation.

v. on 30th June 2021, at a meeting, the Second Respondent humiliating the Claimant by demanding inspection of his laptop and, in particular, of records of every email and meeting between sales executive Mr Bourner and an EMEA client opportunity Investcorp, when the records were available in the Salesforce database;

We have set out above our conclusions about this allegation.

vi. on 30th June 2021, during the same meeting, when the Second Respondent realised the Investcorp opportunity was only at the pre-sales discovery stage, him warning the Claimant, 'If anything else comes up, then that's it.';

We have set out above our conclusions about this allegation.

vii. on 30th June 2021, during the same meeting, the Second Respondent being uninterested in the Claimant's complaints of difference of treatment in respect of no action being taken against the US sales team leaders following their alleged serial and overt breaches of the rules of engagement for financial gain;

We have set out above our conclusions about this allegation.

viii. on 1st July 2021 at 12.30pm the Second Respondent holding a formal meeting with the Claimant at which he reversed his position and accused the Claimant of breaking the Rules of Engagement in relation to Mr Bourner's New York calls. The Second Respondent blamed the Claimant as manager for Mr Bourner's calls, despite not establishing, or attempting to establish, any knowledge by the Claimant of the content of the calls;

We have set out above our conclusions about this allegation.

ix. on or after 1st July 2021, the Second Respondent failing to change his position in relation to the allegations levelled against the Claimant above despite receiving further information from both the Claimant and Mr Bourner which, the Claimant alleges, ought reasonably to have led him to change his position;

We have set out above our conclusions about this allegation.

x. on 1st July 2021, during the same meeting with the Claimant, the Second Respondent making a new and offensive allegation against the Claimant, namely that the Claimant was dishonest because he could not recall who

told him Ms Roman's stock options were visible, while Mr Vik claimed he had said it was Mr Van Pham who told him;

We have set out above our conclusions about this allegation.

xi. on 1st July 2021 at 7.45pm, at a second meeting, the Second Respondent terminating the Claimant's employment on grounds that: (i) the Claimant did not understand the commission split rules as he and/or Mr Bourner should have informed the US sales teams of the Investcorp opportunity; and (ii) that the Claimant was allegedly dishonest in not stating who told him about Ms Roman's stock options;

We have set out above our conclusions about this allegation.

xii. on 2nd July 2021 Kimi Zuluaga (Senior Manager, People Success) confirming the Claimant's dismissal but giving no right of appeal. The Claimant alleges that this was in breach of clause 21.3 of his employment contract and in breach of the ACAS Code of Conduct for disciplinary and grievance procedures;

We have set out above our conclusions about this allegation.

xiii. on 2nd July 2021, Ms Zuluaga threatening that the Claimant would not receive his final pay including holiday pay and expenses unless he entered a settlement agreement. That was contrary to the contractual entitlement to reimbursement of business expenses by clause 9 of his contract, and holiday pay by clauses 14.4 – 14.5;

We have set out above our conclusions about this allegation.

xiv. on 9th August 2021, by email, the appeal officer rejecting the Claimant's appeal against dismissal dated 5th July 2021, with detailed grounds on 13th July 2021. The Claimant alleges that she rejected the appeal taking a prejudicial, perverse approach to the grounds.

We have set out above our conclusions about this allegation.

177. If so, by any of the above conduct, did the First and/or Second Respondents treat the Claimant less favourably than they treated or would have treated a hypothetical non-black, non-Somali/East-African Vice-President of Commercial and Mid-Market Sales in materially similar circumstances?

178. We conclude that they did not. Firstly, we found the repeated allegations by Mr Sykes that the First and/or Second Respondents had an agenda of "whitening" the company in order to attract investors for an IPO not only to be entirely unsupported by any evidence but also to run contrary to our understanding of commercial reality. It seemed to us that Mr Sykes's allegation that the Second Respondent in particular feared a "black face"

would put off investors was as offensive as it was misplaced. We take the view that the contrary is likely to be more accurate, at a time when diversity of all types is attractive to larger global investors.

179. We also conclude that the evidence given as to the significance of the killing of George Floyd and the resultant Black Lives Matter movement had no relevance to the issues before us. It was clear that Mr Williams at least had a (very strongly-held) perception of what the US parent company could/should have done around that time, and that he considered it fell short, not only for him at a personal level but also for his black colleagues. Whether or not he is correct is not an issue we have to determine. How the US parent company dealt with those matters has no relevance to the Claimant's allegations against the First and Second Respondents, and nor, ultimately, did the actions of the US parent in relation to matters of diversity such as events or training bear on their treatment of the Claimant.

180. What we do have to determine is whether the Second Respondent was motivated, consciously or subconsciously, by race in his treatment of the Claimant. We do not have evidence before us to make such a finding. We note that in fact, Mr Williams' evidence was that while the Second Respondent had favourites, his preference did not derive from race and indeed, Mr Williams, himself a black man, said that the Second Respondent treated him "with grace" because he liked him, whereas Mr Funge, a white man, said that the Second Respondent harangued him to the point where he resigned.

181. Further, Mr Doyle, another witness called by the Claimant, said that when he heard about the Claimant and Mr Bourner's dealings with Investcorp (specifically, the fact that they had had calls where the Investcorp employees were in the US and there were none in the UK, with the video switched off or the recording stopped), he thought they had both been "idiots" and had made "too many mistakes" so that there was no way they could be defended. Mr Doyle's evidence was credible not least because he declined to accept in cross examination that the Claimant had been untruthful. He said in fact that he did not question the Claimant's honesty but that sometimes he makes "bad mistakes and silly mistakes".

182. It is further worth noting that notwithstanding Mr Sykes' allegations against Mr Doyle of significant rule-breaking, we saw nothing that post-dated the May warning to the EMEA team[22] that would give us cause to infer that race was the reason for any difference in treatment by the Second Respondent between Mr Doyle and the Claimant. On the contrary, and despite Mr Sykes' submission, Mr Doyle's evidence was that the Second Respondent was just as firm with him in relation to a deal in the US which he was required to turn over to the US team despite Mr Doyle having known the client's representative for a long time and on a personal level.

[22] The Claimant acknowledges in his grounds of complaint that the Advanced Software deal, to which Mr Sykes refers in his skeleton argument, closed in January 2021

183. The Claimant has not shown a prima facie case of racial discrimination and hence has not shifted the burden of proof to the Respondents in this regard. Even if he had, we would have been satisfied that the Respondents have more than amply demonstrated the reason why they behaved as they did towards the Claimant, and it was not because of race.

184. By similar token, the Claimant has not shown that he was subjected to any unwanted conduct "related to" race that might fall within section 26 EqA; we do not need to consider the time point because there is no substantiated allegation of race-related harassment whether within or outside the applicable time limits.

185. Accordingly, the Claimant's claims must fail and are dismissed in their entirety.

186. We add however that based on the evidence before us, the Respondent's record keeping, in relation to the May 2021 investigation, the discussions thereafter and overall, has been very poor. We are aware from our combined experience that this is not uncommon in a business which is new and fast-growing, but the culture has been allowed to persist on opening the UK subsidiary, even though the US parent had been established for several years at that point. Practices in relation to the award of stock options are opaque and clearly something of a lottery, with no consistent basis for their grant and no expectation as to their true value.

187. Even though the Claimant and Mr Bourner did not have two years' service, the way in which their conduct in relation to Investcorp was investigated and the handling of their dismissals was also very poor indeed[23]. We are also mindful that this is not an unfair dismissal claim in the ordinary sense, but we cannot understand why the Second Respondent, harbouring very significant concerns about the Claimant's conduct, would, even on his own account, have drunk three glasses of wine and then taken a taxi with the Claimant. He then conducted the investigation himself once they were both back in the office rather than handing it to somebody impartial with no prior involvement in the case. We have also referred above to the largely incoherent way in which the disciplinary hearing was undertaken and minuted.

188. It is our sincere hope and expectation that if the First Respondent is ever in front of an Employment Tribunal again that such fundamental failings will not have been repeated.

Employment Judge Norris
Date: 30 November 2022

SENT TO THE PARTIES ON

[23] As the Respondents submit however, a lack of reasonable and fair treatment alone is insufficient to found a discrimination claim; it must be less favourable treatment than their comparator's.

30/11/2022

.....
FOR THE TRIBUNAL OFFICE

ANNEX A – AGREED LIST OF ISSUES

THE CLAIMS

1. The Claimant brings the following claims against the First and/or Second Respondents:

A. detriments for making protected disclosures under s.47B (1) Employment Rights Act 1996 ("ERA 1996");
B. automatic unfair dismissal for making protected disclosures under s.103A ERA 1996;
C. direct race discrimination contrary to ss9 (1), 13 (1), 39 (2)(c)(d) Equality Act 2010 ("EqA 2010"); and
D. race-related harassment contrary to ss s9 (1), 26 (1), 39 (2)(c)(d), 40 (1) EqA 2010.

LIABILITY ISSUES

A. Whistleblowing Detriments

Qualifying Protected Disclosure

2. Did the Claimant make qualifying public interest disclosure(s) within the meaning of s.43B (1) ERA 1996? This involves consideration of the questions at paragraphs 3 to 7 below.

3. Did the Claimant make a 'disclosure of information' within the meaning of s.43B (1) ERA? The Claimant relies upon alleged disclosures of information made to the Second Respondent orally on 29th June 2021 while driving back from a football match in Wembley stadium, or at a workplace meeting on 30th June 2021? The Claimant alleges that he disclosed the following information on one or both occasions:

    i. that the First Respondent's sales teams in the United States were intervening in the client opportunities of the Europe Middle East and Africa ('EMEA') team contrary to the Rules of Engagement globally applicable to sales staff. The Claimant said the interventions fell into three groups:

        a. US teams intervening without informing the EMEA team. The Claimant alleges that he referred to US sales teams engaging in multiple client meetings with the following clients: Phillips; Feedazi; and Kraft Heinz.

        b. the US sales team closing EMEA client deals, then offering a modest commission split to the EMEA team. The Claimant alleges that he referred to the following clients: ShowPad; Hypertherm; Payoneer; and Taxys.

        c. the US sales team closing EMEA client deals, but giving no commission split to the EMEA team. The Claimant alleges that he referred to the following specific deals: Coralogix; and Ecochlor;

ii. that the Respondents had failed to control and prevent the conduct of the US teams.

4. If so, did any of the alleged disclosures of information above, in the Claimant's reasonable belief, tend to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject (s.43B(1)(b) ERA 1996)?

   The relevant legal obligation that the Respondents allegedly failed or were likely to fail to comply with was that the First Respondent's sales teams would not intervene in the client opportunities in other sales territories, contrary to the Rules of Engagement globally applicable to all sales staff.

5. If so, were the alleged disclosures made by the Claimant in the public interest (s.43B(1))? The Claimant contends that the disclosures were made in the public interest by reference to the matters set out at POC 6.3., namely that the disclosures were relevant to the entire sales force of the First Respondent, as the alleged breaches by the US teams of the separation of sales territories and the global Rules of Engagement meant to govern the separation bore directly on the EMEA sales team's contractual income.

6. Were the disclosures made to the Claimant's employer or to another person where the Claimant reasonably believed the relevant failure related solely or mainly to the conduct of that other person or to any other matter for which that person had legal responsibility pursuant to section 43C (1)(a)(b)(2) ERA?

Alleged Detriments

7. Did the Respondents subject the Claimant to any or all of the following alleged detriments (POC 42-80 & 83):

   i. on 29th June 2021 the Second Respondent being uninterested in the Claimant's complaints of the difference of treatment between himself and the US sales teams. The Second Respondent allegedly said, 'I don't care';

   ii. on or after 29th June 2021, the Second Respondent failing to advise the Claimant whether the Respondents would investigate the US sales team's conduct, and taking no step to remedy the Claimant's commission losses;

   iii. on 30th June 2021, at a meeting, the Second Respondent humiliating and demeaning the Claimant by demanding inspection of his laptop and, in particular, of records of every email and meeting between sales executive Mr Bourner and an EMEA client opportunity Investcorp, when the records were available in the Salesforce database;

   iv. on 30th June 2021, during the same meeting, when the Second Respondent realised the Investcorp opportunity was only at the pre-sales discovery stage, him warning the Claimant, 'If anything else comes up, then that's it';

v. on 30th June 2021, during the same meeting, the Second Respondent being uninterested in the Claimant's complaints of difference of treatment in respect of no action being taken against the US sales team leaders following their alleged serial and overt breaches of the rules of engagement for financial gain;

vi. on 1st July 2021 at 12.30pm the Second Respondent holding a formal meeting with the Claimant at which he reversed his position and accused the Claimant of breaking the Rules of Engagement in relation to Mr Bourner's New York calls. The Second Respondent blamed the Claimant as manager for Mr Bourner's calls, despite not establishing, or attempting to establish, any knowledge by the Claimant of the content of the calls;

vii. on or after 1st July 2021, the Second Respondent failing to change his position in relation to the allegations levelled against the Claimant above despite receiving further information from both the Claimant and Mr Bourner which, the Claimant alleges, ought reasonably to have led him to change his position.

viii. on 1st July 2021, during the same meeting with the Claimant, the Second Respondent making a new and offensive allegation against the Claimant, namely that the Claimant was dishonest because he could not recall who told him Ms Roman's stock options were visible, while Mr Vik claimed he had said it was Mr Van Pham who told him;

ix. on 1st July 2021 at 7.45pm, at a second meeting, the Second Respondent terminating the Claimant's employment on grounds that: (i) the Claimant did not understand the commission split rules as he and/or Mr Bourner should have informed the US sales teams of the Investcorp opportunity; and (ii) that the Claimant was allegedly dishonest in not stating who told him about Ms Roman's stock options;

x. on 2nd July 2021 Kimi Zuluaga (Senior Manager, People Success) confirming the Claimant's dismissal but giving no right of appeal. The Claimant alleges that this was in breach of clause 21.3 of his employment contract and in breach of the ACAS Code of Conduct for disciplinary and grievance procedures;

xi. on 2nd July 2021, Ms Zuluaga threatening that the Claimant would not receive his final pay including holiday pay and expenses unless he entered a settlement agreement. That was contrary to the contractual entitlement to reimbursement of business expenses by clause 9 of his contract, and holiday pay by clauses 14.4 – 14.5;

xii. on 9th August 2021, by email, the appeal officer rejecting the Claimant's appeal against dismissal dated 5th July 2021, with detailed grounds on 13th

July 2021. The Claimant alleges that she rejected the appeal taking a prejudicial, perverse approach to the grounds.

Reason for Detriments

8. If the Claimant was subjected to any of the alleged detriments above, were any such detriments done on the ground that he had made a protected disclosure (s.47B(1))?

B. Automatic Unfair Dismissal

9. Qualifying Disclosures the Claimant make a protected disclosure(s) within the meaning of s.43B ERA 1996? The questions to be considered on this issue are those at paragraphs 2 to 7 above.

Reason for Dismissal

10. Was the reason for the Claimant's dismissal (or if more than one the principal reason) the fact that he made a protected disclosure?

C. Direct Race Discrimination

Protected characteristic

11. On his race claim, the Claimant relies upon his colour and ethnic origin, namely being black by colour and Somali/East African by ethnic origin, as a protected characteristic.

Less Favourable Treatment

12. Has the Claimant proven, on the balance of probabilities, that the following alleged acts or omissions took place:

    i. in 2020 to 2021, the First and/or Second Respondents awarding the Claimant a lower and slower level of stock options (130,000) than other white Caucasian staff including Jessica Roman (250,000) and Colin Doyle (155,000);

    ii. on 29th June 2021 the Second Respondent aggressively accusing the Claimant of breaking the Rules of Engagement in respect of the Investcorp EMEA client opportunity, during a drive back to London from Wembley stadium, when the Second Respondent was substantially under the influence of alcohol, without having established the Claimant had any responsibility for the matter;

    iii. on 29th June 2021, during the same discussion during the drive back from Wembley stadium, the Second Respondent was uninterested in the Claimant's complaints of the difference of treatment between himself and the

white Caucasian US sales team leaders, who were permitted to break the rules of engagement by intervening for financial gain in EMEA client opportunities. The Second Respondent said, 'I don't care.';

iv. during the same meeting on 29th June 2021, the Second Respondent failing to advise the Claimant that the Respondents would investigate the US sales team's conduct, and taking no step to remedy the Claimant's commission losses;

v. on 30th June 2021, at a meeting, the Second Respondent humiliating the Claimant by demanding inspection of his laptop and, in particular, of records of every email and meeting between sales executive Mr Bourner and an EMEA client opportunity Investcorp, when the records were available in the Salesforce database;

vi. on 30th June 2021, during the same meeting, when the Second Respondent realised the Investcorp opportunity was only at the pre-sales discovery stage, him warning the Claimant, 'If anything else comes up, then that's it.';

vii. on 30th June 2021, during the same meeting, the Second Respondent being uninterested in the Claimant's complaints of difference of treatment in respect of no action being taken against the US sales team leaders following their alleged serial and overt breaches of the rules of engagement for financial gain;

viii. on 1st July 2021 at 12.30pm the Second Respondent holding a formal meeting with the Claimant at which he reversed his position and accused the Claimant of breaking the Rules of Engagement in relation to Mr Bourner's New York calls. The Second Respondent blamed the Claimant as manager for Mr Bourner's calls, despite not establishing, or attempting to establish, any knowledge by the Claimant of the content of the calls;

ix. on or after 1st July 2021, the Second Respondent failing to change his position in relation to the allegations levelled against the Claimant above despite receiving further information from both the Claimant and Mr Bourner which, the Claimant alleges, ought reasonably to have led him to change his position;

x. on 1st July 2021, during the same meeting with the Claimant, the Second Respondent making a new and offensive allegation against the Claimant, namely that the Claimant was dishonest because he could not recall who told him Ms Roman's stock options were visible, while Mr Vik claimed he had said it was Mr Van Pham who told him;

xi. on 1st July 2021 at 7.45pm, at a second meeting, the Second Respondent terminating the Claimant's employment on grounds that: (i) the Claimant did not understand the commission split rules as he and/or Mr Bourner should have informed the US sales teams of the Investcorp opportunity; and (ii) that

the Claimant was allegedly dishonest in not stating who told him about Ms Roman's stock options;

xii. on 2nd July 2021 Kimi Zuluaga (Senior Manager, People Success) confirming the Claimant's dismissal but giving no right of appeal. The Claimant alleges that this was in breach of clause 21.3 of his employment contract and in breach of the ACAS Code of Conduct for disciplinary and grievance procedures;

xiii. on 2nd July 2021, Ms Zuluaga threatening that the Claimant would not receive his final pay including holiday pay and expenses unless he entered a settlement agreement. That was contrary to the contractual entitlement to reimbursement of business expenses by clause 9 of his contract, and holiday pay by clauses 14.4 – 14.5;

xiv. on 9th August 2021, by email, the appeal officer rejecting the Claimant's appeal against dismissal dated 5th July 2021, with detailed grounds on 13th July 2021. The Claimant alleges that she rejected the appeal taking a prejudicial, perverse approach to the grounds.

13. If so, by any of the above conduct, did the First and/or Second Respondents treat the Claimant less favourably than they treated or would have treated a hypothetical non-black, non-Somali/East-African Vice-President of Commercial and Mid-Market Sales in materially similar circumstances?

14. If so, was any such less favourable treatment because of race?

D. Race Related Harassment

Jurisdiction

15. Did any of the acts or omissions alleged to be direct race discrimination occur more than three months before the date on which the Claimant submitted his claim to the Employment Tribunal (extended, as necessary, by ACAS conciliation)?

16. If so, do any such acts or omissions form part of "conduct extending over a period" for the purposes of s.123(3) of EqA 2010?

17. If so, was the claim brought within three months of the end of that period (extended, as necessary, by ACAS conciliation); if not, should time be extended to "the end of such other period as the employment tribunal thinks just and equitable" under s.123(1)(b) of EqA 2010?

Harassment

18. Did the alleged conduct at paragraph 12 above take place?

19. If so, was any such conduct unwanted by the Claimant?

20. If so, can that conduct be said to have had either the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to: (a) the perception of the Claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have had that effect, pursuant to s.26(4) of EqA 2010?

21. If so, was any such conduct related to the Claimant's race?